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No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

EDWARD B. CROUSE,
Petitioner,

v.

UNITED STATES,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court's downward departure from the prescribed range of the United States Sentencing Guidelines based upon factors not expressly prohibited as grounds for departure is to be reviewed *de novo* or under the deferential standard of review set forth in *United States* v. *Rivera*, 994 F.2d 942, 949 (1st Cir. 1993), the same question now before the Court in *Koon* v. *United States*, No. 94-1664 and *Powell* v. *United States*, No. 94-8842.

2. Whether the Sixth Circuit below erred in holding, contrary to the rule in other circuits, that in determining whether a defendant's conduct or prior record is sufficiently unusual to warrant a departure under the Sentencing Guidelines, the district court should compare the defendant's case only with cases involving defendants convicted of the same type of offense.

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PETITION FOR A WRIT OF CERTIORARI

Edward B. Crouse respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on March 18, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 78 F.3d 1097 and is reprinted in the appendix hereto ("App.") at 1a. The opinion of the Court of Appeals in the prior appeal is reported at 38 F.3d 832 and is reprinted at App. 17a. Excerpts of the transcripts of the pertinent portions of the sentencing and resentencing proceedings in the District Court are unreported and reprinted at App. 12a, 38a.

JURISDICTION

The Sixth Circuit entered judgment in this case on March 18, 1996, App. 1a, and denied Crouse's timely petition for rehearing on April 30, 1996. App. 46a. The jurisdiction of the District Court was based on 18 U.S.C. § 3231. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND SENTENCING GUIDELINES INVOLVED

This case primarily involves the following statutes and sentencing guidelines, which are set forth in pertinent part at App. 47a-50a: 18 U.S.C. § 3553(b); 21 U.S.C. §§ 331(a), 333(b); U.S.S.G. §§ 2F1.1, 2N2.1(a), 5H1.6, p.s., 5K2.0, p.s.[1]

INTRODUCTION

This case presents the same question now before the Court in the companion cases of *Koon* v. *United States*, No. 94-1664 and *Powell* v. *United States*, No. 94-8842—whether a district court's downward departure from the prescribed range of the Sentencing Guidelines, based upon a permissible factor, is to be reviewed *de novo* or under the more deferential, abuse-of-discretion standard—and aptly illustrates the problems inherent in the *de novo* review of departure decisions.

After reviewing the numerous materials submitted to it in connection with petitioner's sentencing, making "very detailed findings" regarding petitioner and his past record of community service, App. 13a, and having sentenced petitioner's co-defendants, the District Court concluded that petitioner was entitled to a downward departure based on his "extraordinary" and "extremely un-

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[1] The citations to the Sentencing Guidelines are to the 1987 Manual, the Manual pursuant to which petitioner was sentenced. *See* App. 25a.

usual" close ties to and charitable work and other good deeds in the community in which petitioner lived and with which the District Court was "intimately" familiar. App. 39a-40a. Applying a *de novo* standard of review, the Sixth Circuit set petitioner's sentence aside because, notwithstanding the District Court's detailed findings to the contrary, petitioner's community service record did not "strike[]" it as being sufficiently unusual to warrant the departure. App. 8a. On remand, the District Court imposed the sentence effectively mandated by the Sixth Circuit. That sentence is now before this Court.

The Court should hold the petition pending the disposition of *Koon* and *Powell*. Once those cases have been decided, the Court should grant the petition, vacate the judgment below, and remand the case for further consideration in light of this Court's decision. That decision will have direct legal bearing on this case and could cause the Court of Appeals to alter the outcome below. In the alternative, the Court should grant the petition and decide the other important question presented on which the courts of appeals are divided. *See* S. Ct. Rule 10(a).

STATEMENT OF THE CASE

Petitioner Edward B. Crouse owned a family business —Peninsular Products—that produced and distributed orange juice made from concentrate. Crouse, who during the revelant period was chairman and chief executive officer of Peninsular, delegated the responsibility for the company's day-to-day operations to others. These individuals ran Peninsular's operations from the company's main office in Lansing, Michigan. Crouse monitored orange groves and developed financial information in Florida, while periodically returning to Lansing, where he has resided for more than 60 years, to attend board meetings and to pursue his wide-ranging "personal charitable, civic, and religious interests." App. 19a-20a.

The Food and Drug Administration ("FDA") is responsible for regulating food products under the Federal

Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301 *et seq.* Under FDA regulations, "orange juice from concentrate" may consist only of certain elements, including water, concentrated orange juice, orange juice, orange pulp, orange oil, and orange aroma; it is forbidden to add sugar, pulpwash, citric acid, amino acids, enzymes, or preservatives to a product called "orange juice from concentrate." 21 C.F.R. § 146.145. "Under [federal] law, it is not relevant whether the forbidden additives improve the product's quality." App. 19a. All that matters is that a nonlisted component has been introduced.

The FDCA makes it a federal crime to "adulterate" a food by substituting a component to it that "reduce[s] its quality or strength, or [that] make[s] it appear better or of greater value than it is." 21 U.S.C. § 342(b). *See* App. 18a. The FDCA also makes it a federal crime to introduce "adulterated or misbranded" food into interstate commerce. *Id.* § 331(a). Violating Section 331(a) while acting "with the intent to defraud or mislead" is punishable as a separate felony offense. *Id.* § 332(a)(2).

In 1987, Crouse and several others were charged in an indictment with conspiring to violate the FDCA. Among other things, the indictment alleged that Peninsular and another company with which Peninsular had done business had added certain forbidden additives to orange juice that was produced and sold as "orange juice from concentrate." App. 20a-21a.[2] There was no

[2] The indictment also charged Crouse with making false statements to the grand jury regarding his knowledge of the additives introduced in Peninsular products. There was no conviction on this count. In sentencing Crouse on the sole charge for which he was convicted, however, the District Court explicitly found that "Crouse had not intended to lie to the grand jury when he incorrectly answered a brief flurry of questions." App. 27a. The Sixth Circuit affirmed that finding, concluding, like the District Court, that "it would be understandable that Crouse might have failed to understand the scope or implications of the flurry of questions asked" regarding his personal knowledge of the adulteration of

allegation that the additives posed any danger to the public. Crouse pleaded guilty to one count of causing adulterated orange juice to be introduced into interstate commerce with an intent to defraud or mislead. 21 U.S.C. §§ 331(a), 333(b), recodified as § 333(a)(2). Crouse's co-defendants pleaded guilty to that and other counts. App. 21a.

The government recommended that Crouse be assigned a total offense level of 23, with a criminal history category of I. App. 25a.[3] Under the applicable Sentencing Guidelines, that produced a range of 46 to 57 months, though the statutory ceiling for the type of felony (class E) to which Crouse pleaded guilty limited any actual prison term to 36 months. 21 U.S.C. § 333(a)(2); U.S.S.G. § 5G1.1(a). The District Court calculated a total offense level of 19, then departed downward and sentenced Crouse to 12 months home confinement and a $250,000 fine. App. 26a, 45a.[4]

Peninsular's orange juice and certain acts attendant thereto. App. 27a-28a n.7.

[3] Crouse was sentenced under the 1987 Sentencing Guidelines. The total offense level of 23 was calculated by the government as follows: (1) a base offense level of 6 for violating the FDCA, U.S.S.G. §§ 2N2.1, 2F1.1(a); (2) a specific-offense level increase of 11 because the amount of loss occasioned by the fraud was more than $5 million, *id.* § 2F1.1(b)(1)(L); (3) a 2-level enhancement for perpetrating a scheme to defraud more than one victim, *id.* § 2F1.1(b)(2)(B); (4) a 4-level enhancement for being the organizer or leader of a criminal activity that involved five or more persons, *id.* § 3B1.1(a); (5) a 2-level enhancement for obstructing justice by making false statements to the grand jury, *id.* § 3C1.1; and (6) a 2-level reduction for accepting responsibility, *id.* § 3E1.1(a). App. 25a.

[4] The total offense level of 19 was calculated as follows: (1) a base offense level of 6 for violation of the FDCA, U.S.S.G. § 2N2.1(a); (2) a specific-offense level increase of 11 because the amount of loss occasioned by the fraud was more than $5 million, *id.* § 2F1.1(b)(1)(L); (3) a 2-level enhancement for playing a leadership role that was less extensive than the one alleged by

Prior to sentencing, the District Court received and reviewed not only the presentence report and sentencing memorandum, but also "a substantial number of letters from religious, civic, and legal figures, appealing for mercy" on Crouse's behalf. App. 25a-26a. "Letter after letter * * * indicated * * * great confidence in [Crouse] over a long period of time." App. 41a. Together, the letters painted a vivid picture of Crouse's 30-year history of close community ties and charitable and other good works, which the court found to be "extraordinary" and "extremely unusual" in nature. App. 40a.[5] The District Court further found that Crouse "has made a greater

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the government, *id.* § 3B1.1(c); (4) a 2-level enhancement for more than minimal planning, *id.* § 2F1.1(b)(2)(A); and (5) a 2-level reduction for acceptance of responsibility, *id.* § 3E1.1(a). *See* App. 26a-28a & n.8.

[5] To list only "a few" of the good works discussed in the "large number of documents" the court received:

> He was one of the charter persons who established the Lansing Airport Authority; board chairman, bank director, chairman of the board of the bank of First of America-Central of Lansing; on the board of Sparrow Hospital, one of the primary originators, Sparrow Hospital being the largest medical care facility in central Michigan. He was one of the initiators, planners, and board members of Physician's Health Plan, one of the premier physician health plans in the United States. I find that he was board chairman and leader of Plymouth Congregational Church, a rather prominent church in the area. Greater Lansing United Way, he's been on the board of that. Lansing Rotary, he's been on the Board of that. He was a primary contributor to the Lansing Food Bank. He was chairman of the Greater Lansing Chamber of Commerce and served a number of years in various capacities of that nature as well as serving on the board of the American Red Cross. I could go on and on with what I have found here in the documents that come before me of a very unusual nature. [App. 40a-41a.]

Crouse performed these services, moreover, with "no remuneration whatever to him." App. 41a. "That is, these were matters that were undertaken purely of a voluntary nature and they have continued rather unabated for 30 years or more." *Id.*

singular contribution to a middle-sized community than anyone else * * * ever appear[ing] before th[e] Court." App. 42a. That finding was based in part on the District Court's own "intimate[]" familiarity with the community in which Crouse spent most of his life. App. 39a.

The District Court found the circumstances of Crouse's case to be "peculiar[] and substantially unusual in their entirety." App. 38a. *See* App. 39a, 40a, 41a, 42a.[6] Indeed, the court concluded that the circumstances were "so unusual as to take [the case] into an extraordinary category as to be extraordinarily out of the heartland of those who would normally appear before a court." App. 39a. Thus, while recognizing that "[d]ownward departures are to be very sparingly used by the Court as a sentencing methodology," the District Court ultimately determined—after reviewing the record, hearing argument from the parties, and hearing from Crouse himself—that the unique circumstances of Crouse's case warranted a

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[6] In addition to finding his "charitable and prior good works [to be] extremely unusual," App. 40a, the District Court found that Crouse was "on an entirely different rung of culpability for what occurred" compared with his co-defendants, whom the District Court also sentenced. App. 42a. While his co-defendants actively sought to market an orange juice product they knew was not in compliance with FDA requirements, "Mr. Crouse's role was a silent one." *Id.* Indeed, as noted, the District Court even refused to credit the government's allegation that Crouse had lied to the grand jury about his knowledge of the alleged adulteration scheme. App. 27a-28a n.7. As far as community service was concerned, the court found that no other defendant came "even within a mile" of Crouse. App. 41a.

The District Court also found that Crouse already had suffered greatly as a result of his conviction, both in terms of the "mortification and public [dis]approbation" caused by his offense and extensive media coverage of it, and in terms of the financial loss occasioned by his offense, which, among other things, "basically made Peninsular * * * worthless," caused him to lose his ownership interest in the company, and "jeopardized [his] pension rights." App. 40a.

departure pursuant to 18 U.S.C. § 3553(b), and U.S.S.G. 5K2.0, p.s. App. 38a.[7]

The government appealed Crouse's sentence to the Sixth Circuit and that court reversed.[8] The principal issue before the Court of Appeals was "whether the case is sufficiently unusual to warrant a departure." App. 29a (internal quotation marks omitted). Following its prior precedent, the Sixth Circuit considered that question *de novo*. *Id.* While conceding that "[t]he record shows that Crouse has performed many fine deeds in his life and has won the devotion and admiration of people whom he has helped and who have honored him with positions of community leadership," the Court of Appeals concluded that

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[7] In departing downwards, the District Court relied primarily on Crouse's close community ties and extensive community service record. *See* App. 40a. Those factors are permissible—though not encouraged—bases for a departure. *See, e.g.*, U.S.S.G. § 5H1.6 ("Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable sentencing range"); *id.* § 5H1.11 ("Military, civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range") (effective Nov. 1991). Even so-called "discouraged factors," however, may provide the basis for a decision to depart when those factors are present in an extraordinary or unusual way. *Id.* Ch. 1, Pt. A, § 4(b); *id.* § 5K2.0, p.s. *See United States* v. *Rivera*, 994 F.2d 942, 949 (1st Cir. 1993) (Breyer, J.) (district courts "retain[] * * * freedom to depart whether such departure is encouraged, discouraged, or unconsidered by the Guidelines"); Symposium, *Conference on the Federal Sentencing Guidelines: Summary of Proceedings*, 101 Yale L. J. 2053, 2059 (1992) ("Congress did not say that [discouraged] factors should not lead to departures, and the Commission has stated that judges should depart in atypical cases * * *").

[8] Crouse cross-appealed his sentence on a number of different grounds, including that the District Court improperly had calculated the loss occasioned by the scheme alleged in the indictment. The Sixth Circuit affirmed the District Court's loss calculation. App. 36a.

"the circumstances on which the district judge relied below were not of a sufficiently unusual kind or degree that warranted a departure." App. 29a-31a. In so finding, the court stressed that "white-collar" defendants like Crouse would rarely qualify for a departure based on prior community service, because, in the court's view, it is "usual and ordinary" for such individuals to have community service records. App. 29a.

The case was then remanded for resentencing. On remand, Crouse sought to supplement the record with additional documentation and testimony establishing that his community service record was unusual, even when compared to other corporate executives. The District Court permitted limited testimony on this score, but rejected Crouse's other efforts to supplement the record. App. 13a.[9] This is because, in light of the Court of Appeals' rejection of the District Court's "very detailed findings at the time of the original sentence," and apparent admonition not to depart on the basis of Crouse's community service record, the District Court viewed its function as being "extremely limited." *Id.*[10] Thus, the District Court refused to revisit the issue of a departure for community ties or service and sentenced Crouse to an additional 18 months imprisonment. App. 5a, 6a.[11]

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[9] The additional testimony that was permitted "reinforced the fact that Crouse's contributions to numerous charitable and civic organizations were extensive both in time and intensity." App. 4a. The testimony "also tended to show that Crouse's volunteer efforts began at a relatively young age, and at a time when he was not an elite executive," and that his "personal involvement was such that he was not merely donating funds or filling an honorary slot on the mastheads of various groups." *Id.*

[10] The District Court also thought it was constrained by the "law of the case" doctrine. The Court of Appeals disagreed. App. 5a.

[11] The District Court did agree—with the government's concurrence—to depart downward slightly to take into account that Crouse already had served his original sentence while the first

A second appeal followed and the Sixth Circuit once again reviewed Crouse's sentence *de novo*. App. 4a. Crouse argued that the District Court had improperly constrained its sentencing function on remand—in particular, by categorically refusing to revisit whether Crouse was entitled to a departure on the basis of his community service record. The Sixth Circuit agreed, but nevertheless determined that the District Court was "basically" correct in concluding that Crouse was not entitled to the requested departure, since "Crouse's community service resume" did not "strike[]" the court as sufficiently unusual to warrant a departure when compared with the record of other white-collar defendants. App. 7a, 8a. The Sixth Circuit rejected Crouse's other objections and affirmed his new sentence.

The Sixth Circuit denied Crouse's timely petition for rehearing on April 30, 1996, in which Crouse argued, among other things, that the Sixth Circuit should revisit its precedent authorizing *de novo* review of departure decisions. App. 46a.[12] On May 14, 1996, the Court of Appeals granted a 30-day stay of the mandate pending

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appeal was pending. With this 4-level departure, Crouse received a total offense level of 15 and was sentenced to an additional 18 months. App. 14a-15a.

[12] In his petition, Crouse specifically objected to the Sixth Circuit's exercise of *de novo* review over Crouse's sentence and the District Court's decision to depart, and requested that the court reconsider its precedent in light of the decisions in other circuits requiring a more deferential standard of appellate review. *E.g.*, *United States* v. *Rivera*, 994 F.2d 942 (1st Cir. 1993); *United States* v. *Broderson*, 67 F.3d 452 (2d Cir. 1995). In addition, Crouse argued that he was denied due process of law when the Sixth Circuit engaged in *de novo* review of the truncated record before it, even though the court agreed with Crouse that the District Court had erroneously viewed its function on remand and thus failed to give due consideration to Crouse's request to supplement the record of Crouse's community service. *See* Pet. for Reh. at 1-11.

the filing and disposition of this petition for a writ of certiorari. App. 16a.[13]

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS THE SAME QUESTION BEFORE THE COURT IN *KOON* v. *UNITED STATES*, NO. 94-1664 AND *POWELL v. UNITED STATES*, NO. 94-8842, AND THEREFORE SHOULD BE HELD PENDING THE DISPOSITION OF THOSE CASES, AND THEN BE REMANDED TO THE SIXTH CIRCUIT FOR RECONSIDERATION IN LIGHT OF THE COURT'S DECISION.

The first question presented in this case is the one now before the Court in *Koon* v. *United States*, No. 94-1664 and *Powell* v. *United States*, No. 94-8842: whether a district court's downward departure from the prescribed guidelines range based upon permissible factors is to be reviewed *de novo* or under the more deferential, abuse-of-discretion standard. Crouse properly raised that issue below. *See* note 12, *supra*. And, given the record in this case—including the "very detailed findings" made by the District Court at the original sentencing, App. 13a—the resolution of that issue will have a direct legal bearing on the decision reached below. As a result, this Court should hold the petition pending the disposition of *Koon* and *Powell* and, once those cases have been decided, grant the petition, vacate the judgment below, and remand the case for reconsideration in light of this Court's decision. *See Lawrence* v. *Chatter*, 116 S. Ct. 604 (1996) (per curiam) (discussing this Court's "GVR" practice).

The *Koon* and *Powell* cases arose out of the well-publicized Rodney King beating incident. Petitioners

[13] In his stay application, Crouse called to the Sixth Circuit's attention this Court's review of *Koon* v. *United States*, No. 94-1664 and *Powell* v. *United States*, No. 94-8842, and argued that the Court's decision in these cases would have a direct bearing on this case. *See* Pet. for Stay at 2-3.

Koon and Powell are two of the police officers involved in the incident. After being acquitted on charges in state court, the officers were tried and convicted in federal court for their role in the incident. At sentencing, the District Court departed downward in the case of both Koon and Powell because of the presence of an unusual combination of factors that it believed took the cases outside of the "heartland" when considered *in toto*. *See United States* v. *Koon*, 833 F. Supp. 769, 785-786, 790 (C.D. Cal. 1993), *rev'd in relevant part*, 34 F.3d 1416, 1425, 1451-61 (9th Cir. 1994), *pet. for cert. granted*, 116 S. Ct. 39 (U.S. Sept. 27, 1995) (Nos. 94-1644 and 94-8842). The Ninth Circuit reviewed the District Court's departure *de novo* and reversed. 34 F.3d at 1451.

This case is analogous to *Koon* and *Powell* in several respects. In *Koon* and *Powell*, as in this case, the district court prior to sentencing considered materials submitted by the parties and concerned community members, heard from the defendants themselves, and made detailed findings of fact. In *Koon* and *Powell*, as in this case, the district court departed downward in imposing sentence based upon its determination that extraordinary circumstances existed—which were not so-called "forbidden" factors under the guidelines—which took the cases outside of the "heartland." And in *Koon* and *Powell*, as in this case, the court of appeals substituted entirely its own experience and familiarity with the defendants and record before it for that of the sentencing court in deciding whether a departure was appropriate.

This case differs from *Koon* and *Powell* in at least one respect, which made the Sixth Circuit's decision to exercise *de novo* appellate review even less appropriate. One of the principal issues before the court of appeals in *Koon* and *Powell* was whether the district court had properly considered certain factors in its decision to depart. While none of the factors was explicitly forbidden under the guidelines, the Ninth Circuit held that

the district court's consideration of the factors was "inconsistent with the structures and policies of the guidelines" and reversed. *See* 34 F.3d at 1457. In this case, there is no question that the District Court's departure decision was based upon proper factors; the only issue is whether the District Court reasonably determined that those factors were present in such an "unusual" degree as to warrant the departure. *See supra* at 8. That determination is even more factbound than the departure issues in *Koon* and *Powell.*[14]

De novo review is inappropriate in the circumstances presented both here and in *Koon* and *Powell.* As explained by the petitioners in *Koon* and *Powell,* applying an abuse-of-discretion standard, rather than *de novo* review, to the review of downward departures based upon permissible factors comports with (1) Congress' clear intent in passing the Sentencing Reform Act of 1984, *see, e.g.,* 18 U.S.C. § 3742; (2) this Court's prior precedents, *see, e.g., Williams* v. *United States,* 503 U.S. 193 (1992); (3) the long-standing tradition of permitting trial judges a measure of discretion in sentencing decisions, *see, e.g., Mistretta* v. *United States,* 488 U.S. 361, 363-364 (1989); and (4) the sound administration of justice in individual cases.

As this case itself illustrates, sentencing judges are uniquely situated to gauge whether defendants qualify

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[14] As discussed in Part II below, in its first opinion in this case the Sixth Circuit narrowed—even further—the category of cases in which a district court may depart in the case of a *white-collar* defendant on the basis of his community ties or charitable deeds. *See* App. 29a-30a. This was error as a matter of law and conflicts with the rulings in other circuits. *See infra* at 16-22. Nevertheless, as the Sixth Circuit took pains to make clear in its second opinion in this case, its decision that Crouse was not entitled to a downward departure on the basis of his community ties and service record ultimately was based on its finding that the facts of this case are not sufficiently unusual to warrant a departure on that basis. App. 7a, 8a.

for departures on the basis of atypical circumstances. The District Court below heard from Crouse and his co-defendants. The District Court was "intimately" familiar with the community in which Crouse lived. App. 39a. And the District Court, having the benefit of receiving "hundreds of letters" on behalf of defendants facing sentencing each year, determined that the letters sent on behalf of Crouse set him apart from virtually every other defendant that had come before the court in terms of Crouse's extensive community service record. App. 41a. Professing no particular familiarity with the community in which Crouse lived, lacking any opportunity to hear personally from Crouse or his co-defendants, and having only a cold record before it, the Sixth Circuit felt free simply to disregard the District Court's factbound departure decision on the ground that the case did not "strike[]" it—from its inferior vantage point—as being sufficiently unusual. App. 8a. That was error.[15]

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[15] The Sixth Circuit's inferior vantage point and lack of familiarity with the record caused it to make several misleading and factually incorrect statements and innuendos in the first appeal, including the following: (1) that Crouse's community contributions were solely from his "checkbook," App. 29a-30a, which they were not, App. 4a, 8a; (2) that Crouse's community service was exclusively related to his position as a corporate executive, App. 29a, which it was not, App. 4a, 8a; and (3) that Crouse's community service record was not atypical when compared with other executives, App. 29a, which it was, App. 4a, 8a. Crouse sought to address these misconceptions on remand, but the District Court permitted only limited additional testimony because it believed its role was "extremely limited" at resentencing under the Sixth Circuit opinion. App. 13a. As it turned out, even the Sixth Circuit agreed in the second appeal that the District Court had erroneously misunderstood its role in the resentencing proceeding. App. 5a, 6a. At that point, however, it was too late for Crouse to supplement the record. As a result, Crouse was effectively sentenced—by the Court of Appeals, no less—on an incomplete record. This in itself raises significant due process concerns. *See, e.g., United States* v. *Tucker*, 404 U.S. 443 (1972); *Townsend* v. *Burke*, 334 U.S. 736 (1948). *See supra* at 9-10 & n.12. It cannot be what Congress intended when it passed the Sentencing Reform Act of 1984.

Because this case squarely presents the question before the Court in *Koon* and *Powell*, and because the answer given by the Court to that question will have a direct legal bearing on this case and, in all likelihood, the outcome reached by the Sixth Circuit below, the Court should hold this case pending the disposition of *Koon* and *Powell*. Once those cases have been decided, the Court should remand this case to the Sixth Circuit for further consideration in light of the Court's decision.

As this Court recently observed, "the GVR order has, over the past 50 years, become an integral part of th[e] Court's practice, accepted and employed by all sitting and recent Justices." *Lawrence* v. *Chatter*, 116 S. Ct. at 606. The most common of the "wide range of developments" in light of which this Court typically exercises its GVR authority is an intervening decision of this Court which the court below could not have fully considered, which could cause the lower court to reject a "premise" on which its ruling was based if given the opportunity for further consideration, and which could determine the "ultimate outcome of the litigation." *Id.* at 606-607. In criminal cases, such as this, the Court's practice of remanding cases in these circumstances is perhaps even more firmly rooted. *See Stutson* v. *United States*, 116 S. Ct. 600, 603 (1996).

A GVR order is plainly warranted here: the Sixth Circuit could not have considered the Court's impending decision in *Koon* and *Powell* at the time of Crouse's appeals; if given the opportunity for further consideration in light of this Court's decision, the Sixth Circuit could reject a fundamental premise on which its decision was based; and the rejection of that premise could—indeed, should—determine the "ultimate outcome" in this case. Thus, the Court should grant the petition, vacate the judgment below, and remand the case to the Sixth Circuit for further consideration in light of the Court's decision in *Koon* and *Powell*.

II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER THE SIXTH CIRCUIT ERRED IN HOLDING, CONTRARY TO THE RULE IN OTHER CIRCUITS, THAT IN DETERMINING WHETHER A CASE IS SUFFICIENTLY UNUSUAL TO WARRANT A DEPARTURE UNDER THE SENTENCING GUIDELINES, THE DISTRICT COURT SHOULD COMPARE THE DEFENDANT'S CASE ONLY WITH CASES INVOLVING THE SAME TYPE OF OFFENSE.

This case presents a second question on which the courts of appeals are presently divided: whether, in considering a request to depart under the Sentencing Guidelines, the district court should focus on whether the case is sufficiently unusual to warrant the departure only when compared with cases involving defendants convicted of the same type of offense. The First Circuit has answered that question in the negative, holding that "[a] court should survey those cases where the [particular departure] factor is present, *without limiting its inquiry to cases involving the same offense*, and only then ask whether the defendant's record stands out from the crowd." *United States* v. *DeMasi*, 40 F.3d 1306, 1324 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 947 (1995) (emphasis added). The Sixth Circuit below, consistent with the rule in the Eighth Circuit, answered that question in the affirmative, holding that the question whether Crouse was entitled to a departure based upon his community service record turned on whether that record was unusual for a person convicted of "similar white-collar crimes." App. 29a. The question is both important and recurring. In the event the Court concludes that a GVR order is not warranted in light of *Koon* and *Powell*, the Court should grant the petition and resolve this conflict. *See* S. Ct. Rule 10(a).

In its decisions below, the Sixth Circuit narrowed even further the circumstances in which a district court may

depart under 18 U.S.C. § 3553(b) and U.S.S.G. § 5K2.0, p.s., based upon the existence of atypical or unusual circumstances. It rejected the District Court's comparison of Crouse's community service record with other defendants with community service records, and ruled that the relevant inquiry was instead whether Crouse's record was unusual in comparison with cases involving "the prosecution of similar white-collar crimes involving high-ranking corporate executives * * *." App. 29a. That analysis is based upon the "expectation" that individuals who commit similar offenses will behave in certain ways—in this case, that corporate executives who commit white-collar crimes typically will be community leaders "with qualities that lead * * * to useful community activity"—and that the guidelines already take this into account. App. 8a.

The Eighth Circuit adopted the same approach in *United States* v. *Haverstat*, 22 F.3d 790 (8th Cir. 1994), *cert. denied*, 116 S. Ct. 671 (1995). The defendant in *Haverstat* was convicted of conspiring to fix prices in violation of the antitrust laws. The district court departed downward at sentencing after finding, among other things, that the defendant's record of charitable activities and good character was exceptional. The Eighth Circuit reversed on the ground that the defendant's "charitable and volunteer activities, while considerable, do not make him an atypical defendant *in antitrust price-fixing cases*." 22 F.3d at 794, 795-796 (emphasis added). Like the Sixth Circuit, the Eighth Circuit's offense-specific departure analysis was grounded in the expectation that "high-level business executives * * * who are in a position to commit Sherman Act violations" are apt to engage in "charitable and benevolent activities." *Id.* at 796.

Other courts have followed this same approach in considering requests for departures on the basis of extraordinary circumstances. *See, e.g., United States* v. *Bruce*, 909 F. Supp. 1034, 1045 (N.D. Ohio 1995) (citing the Sixth Circuit decision in this case for the proposition that "[d]epartures for unusual factors are only justified where

the factors are substantially in excess of that which is ordinarily involved *in the offense of conviction*") (emphasis added). *Cf. United States* v. *Scheiner*, 873 F. Supp. 927, 935 (E.D. Pa.) (citing this case and *Haverstat* to support the proposition that the sentencing court was not required to examine the defendant's civic and charitable activities in the "abstract," but instead could focus on the fact that the defendant was a white-collar criminal in sentencing him), *aff'd*, 61 F.3d 897 (3d Cir. 1995) (table).[16]

In *United States* v. *DeMasi*, the First Circuit squarely rejected the Sixth and Eighth Circuit approach. 40 F.3d at 1324. The defendants in that case were convicted on various charges stemming from their involvement in an attempted bank robbery. At sentencing, the district court departed downward in the case of one of the defendants (Bonasia) because his "charitable work and community service stood apart from what one would expect of 'the typical bank robber.'" *Id.* at 1324. In so finding, the court explicitly limited its inquiry to cases involving the same type of offense—*i.e.*, bank robbery:

> If this was a securities fraud case or bank fraud case, probably the downward departure would not be appropriate. Because presumably people of the sort

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[16] In a related line of cases, courts of appeals have held that the monetary contributions of defendants to charitable organizations should not be taken into account where it is established or likely that the defendant's illicit activities were a source of the contributed funds. *E.g.*, *United States* v. *McHan*, 920 F.2d 244, 248 (4th Cir. 1990) (finding that "some of the money that [the defendant] used in his real estate and banking ventures, both pillars of his prominence in the community, had questionable origins"). This is not, however, a case of "checkbook charity." Crouse's community service record was acquired as a result of the voluntary contribution of his time and efforts—rather than money—to charitable, religious, and other civic organizations. Moreover, unlike *McHan* and similar cases, Crouse's charitable and civic acts were entirely unrelated to the offense to which he pleaded guilty. *See* App. 4a; note 5, *supra*.

> that Dr. Bonasia is [*i.e.*, individuals who have a past record of charitable work and community service] are likely to engage in those activities and be within the contemplation of the Sentencing Commission. [*Id.* (brackets in original).]

The First Circuit reversed. It stated the following rule: "A court should survey those cases where the [particular departure] factor is present, *without limiting its inquiry to cases involving the same offense*, and only then ask whether the defendant's record stands out from the crowd." *Id.* (emphasis added). That was the analysis undertaken by the District Court in this case in making its initial departure decision—before the Sixth Circuit required it to narrow its inquiry only to white-collar defendants convicted of similar offenses. *See supra* at 7-9. The First Circuit explicitly recognized the circuit split as to the proper departure analysis by citing the Eighth Circuit's decision in *Haverstat* as contrary authority. 40 F.3d at 1324. *See also United States* v. *Jackson*, 30 F.3d 199, 202-203 (1st Cir. 1994) (reviewing determination to depart based upon the unusual circumstances presented by defendant's age by comparing case to all other cases presenting the same factor, without regard to the underlying crime).

Consistent with the First Circuit approach, other courts of appeals have analyzed departures based upon unusual circumstances on the basis of whether the circumstances take the case out of the heartland without regard to the nature of the underlying offense. *See, e.g., United States* v. *Johnson*, 964 F.2d 124, 128-129 (2d Cir. 1992) (upholding departure based upon extraordinary family situation without reference to underlying offense); *United States* v. *Monaco*, 23 F.3d 793, 801, 803 (3d Cir. 1994) (upholding departure based upon extraordinary mental anguish without reference to underlying offense); *United States* v. *Canoy*, 38 F.3d 893, 907-908 (7th Cir. 1994) (reviewing departure based upon extraordinary family situation without reference to underlying offense); *United*

States v. *Pena*, 930 F.2d 1486, 1494-95 (10th Cir. 1991) (same).

The question whether to follow the rule applied by the Sixth Circuit below and the Eighth Circuit in *Haverstat*, or the one applied by the First Circuit in *DeMasi*, is important. Indeed, the question was outcome determinative below: finding that Crouse's impressive community service resume was extraordinary in comparison with all other defendants who had previously appealed to the court for a departure on that basis, the District Court granted the requested departure; believing that the appropriate inquiry was whether Crouse's record was extraordinary in comparison only with other corporate executives charged with white-collar crimes, the Sixth Circuit reversed. *See supra* at 7-9.[17] The question arises, moreover, any time a district court is confronted with a request to depart on the basis of unusual circumstances which may be taken into account under the guidelines.

This Court should grant the petition and resolve this conflict in favor of the First Circuit approach. Nothing in the Sentencing Reform Act or guidelines themselves indicates that either Congress or the Sentencing Commission intended to narrow sentencing courts' discretion to

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[17] As noted, on remand Crouse put on additional evidence showing that his record of community service was extraordinary even in comparison to similarly situated white-collar defendants, and sought—but was denied—an opportunity to present additional evidence on this score. The District Court never really considered Crouse's arguments or additional testimony, however, because the court believed the Sixth Circuit's initial decision had stripped it of "the ability to go back and look at departures based upon community service." App. 13a. In the second appeal, the Sixth Circuit agreed that the District Court had erroneously limited its function on remand, but by then it was too late for Crouse fully to supplement the record with additional evidence available to him establishing that he was entitled to the original departure, even under the narrow Sixth Circuit approach.

depart on the basis of unusual circumstances even further by requiring the courts to consider whether the departure is warranted only in light of the circumstances presented by other cases involving defendants convicted of the same type of offense. Nor is there any indication that either Congress or the Sentencing Commission intended to single out white-collar defendants for disparate treatment in determining whether a departure is warranted on the basis of community service or any other non-forbidden factor.[18]

At bottom, moreover, the Sixth and Eighth Circuit analysis is grounded in stereotypical notions regarding the socio-economic status and behavioral traits of defendants who commit particular offenses. The Sixth Circuit analysis in this case was grounded in the "expectation" that white-collar executives will have engaged in a "significant amount" of community service. App. 9a. This "expectation," in turn, was based on the court's observation that "the qualities that lead to an executive position are often those that lead to useful community activity." App. 8a. No authority was cited for these propositions. But even taking them as true as a general matter, it is no more appropriate to presume for purposes

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[18] White-collar criminals were singled out by the Sentencing Commission in one respect. As Justice Breyer has explained in another context, in drafting the guidelines the Commission sought to increase the severity of punishment for white-collar offenses. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 20-23 (1988). But while increasing the typical range of punishment for white-collar offenses, there is no indication that the Commission sought to narrow the circumstances warranting departure in the case of white-collar—as opposed to all other—criminals. *See* Deborah Young, *Federal Sentencing: Looking Back to Move Forward*, 60 U. Cin. L. Rev. 135, 149 (1991) (reviewing Stanton Wheeler, *et al.*, *Sitting in Judgment: The Sentencing of White-Collar Criminals* (1988)) ("The guidelines do not provide different formulas to assess the individual's character [in determining whether to depart based on a discouraged factor] for a white-collar case and for a common crime case").

of imposing sentence that corporate executives like Crouse are naturally endowed with benevolence than it is to presume that bank robbers like the defendant in *DeMasi* are not.[19]

The guidelines explicitly prohibit sentencing courts from taking into account a defendant's socio-economic status and similar personal characteristics (*e.g.*, race, sex, and national origin) to prevent courts from adjusting sentences based upon these types of stereotypical expectations. *See* U.S.S.G. § 5H1.10; 28 U.S.C. § 994(d). And the courts of appeals have regularly rejected the notion that a person's sentence should be enhanced or decreased on the basis of such characteristics. *See, e.g., United States* v. *Graham*, 946 F.2d 19, 22 (4th Cir. 1991) (a defendant should not have to pay a greater fine simply because he or she is affluent); *United States* v. *Hatchett*, 923 F.2d 369, 374 (5th Cir. 1991) (sentencing court cannot impose a harsher or more lenient sentence based upon defendant's socio-economic status); *United States* v. *Barone*, 913 F.2d 46, 51 (2d Cir. 1990) (former judge could not be incrementally punished because of his position in the community, profession, or the fact that he had once held public office).

This Court should grant the petition and make clear that in deciding whether to depart on the basis of unusual circumstances, district courts should consider whether the circumstances are sufficiently unusual to warrant the departure in light of *all* cases involving defendants seeking departure on the same factor, and not only those cases that involve defendants convicted of the same type of offense.

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[19] Moreover, in this case the record establishes that "Crouse's volunteer efforts began at a relatively young age"—before he became an "elite executive." App. 4a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be held pending the disposition of *Koon* v. *United States*, No. 94-1664 and *Powell* v. *United States*, No. 94-8842. Once those cases have been decided, the petition should be granted, the judgment vacated, and the case remanded for further consideration in light of this Court's decision. In the alternative, the petition for a writ of certiorari should be granted and the Court should decide the other important question presented.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 95-1189

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EDWARD B. CROUSE,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Michigan
Robert Holmes Bell, Judge

Argued Dec. 1, 1995

Decided March 18, 1996

Rehearing and Suggestion for Rehearing En Banc
Denied April 30, 1996

Before: BOGGS and DAUGHTREY, Circuit Judges; MATIA, District Judge.*

BOGGS, Circuit Judge.

This appeal arises from the conviction of Edward Crouse for the interstate shipment and sale of adulterated

* The Honorable Paul R. Matia, United States District Judge for the Northern District of Ohio, sitting by designation.

orange juice in violation of the Food Drug and Cosmetic Act, 21 U.S.C. § 341. Crouse is before this court for a second time alleging errors in the district court's efforts to sentence him. Because we believe that the sentencing issues were fully and fairly litigated in front of the district court in both the first and second sentencing hearings, and that the "new" evidence Crouse advances now is not so new, we conclude that the district court did not err by refusing to reopen several issues for further argument at the second sentencing hearing. Accordingly, we affirm Crouse's sentence.

I

The underlying facts leading to the conviction of Mr. Crouse for interstate shipment of adulterated orange juice are not in dispute in this appeal. These facts will not be discussed further, but can be found in *United States* v. *Kohlbach*, 38 F.3d 832 (6th Cir.1994). Crouse pled guilty to causing the interstate shipment of adulterated orange juice, and the district court calculated his final offense level to be 19. *Id.* at 836-37. Because he had no prior convictions, the guidelines called for Crouse to be sentenced to between 30 and 37 months of imprisonment. The district court, however, granted Crouse's request for a substantial downward departure and reduced his sentencing range by 13 levels. The district court based its decision to depart downward on three factors: (1) Crouse's record of community service; (2) its desire to achieve proportionality in sentencing among the group responsible for the shipments; and (3) the extensive business losses that Crouse suffered as a result of his conviction. *Id.* at 837. The downward departure allowed the district court to sentence Crouse to probation, with a year of home confinement as a condition of the probation. *Id.* at 838.

The government appealed this downward departure, and Crouse cross-appealed the method by which the district

court determined the amount of loss he caused for sentencing purposes. We heard both appeals. In October 1994, we reversed the downward departure, but affirmed the district court's loss calculations as not clearly erroneous. *Id.* at 836-42. Crouse also moved for a rehearing, and rehearing en banc, and these were denied in December 1994.

The factual developments since Crouse's first appeal are quite limited, involving only the events of the resentencing hearing held on February 7, 1995. Crouse asked again to receive the community service departure, citing new evidence, and again challenged the loss calculations. Since Crouse began serving his one year of home confinement on December 1, 1993, and completed it on November 30, 1994, the court gave Crouse credit for the one year he had already spent under home confinement, departed downward by four levels, and sentenced Crouse to an additional 18 months imprisonment. Three areas of the resentencing record must be considered in this appeal.

First, Crouse submitted a sentencing memorandum that outlined several areas in which he requested the district court to revisit the factual and legal basis of his sentence. Crouse also asked to be allowed to present additional evidence at the resentencing to address the conclusions of the first appellate panel, especially with regard to the issue of departure for community service pursuant to USSG § 5H1.11. Finally, Crouse asked the district court to consider the effect of Amendment 508 to the sentencing guidelines, USSG App. C. para. 508. Amendment 508 was enacted after this court's decision in *Kohlbach* and addressed the interpretation that should be given to the phrase "not ordinarily relevant" in § 5H1.11 of the guidelines.

At the resentencing hearing, Crouse was allowed to present additional testimony regarding the nature of his

community service work. Crouse presented testimony from four witnesses who were familiar with Crouse and his involvement in the community. The witnesses reinforced the fact that Crouse's contributions to numerous charitable and civic organizations were extensive both in time and intensity. The witnesses also tended to show that Crouse's volunteer efforts began at a relatively young age, and at a time when he was not an elite executive. Finally, this testimony also suggested that Crouse's personal involvement was such that he was not merely donating funds or filling an honorary slot on the mastheads of various groups.

Crouse also included in his memorandum evidence concerning the duration and condition of his home confinement during the appeals process, as well as the fact that he has paid in full the $250,000 fine imposed by the court.

The district court allowed Mr. Crouse to make this record at resentencing, yet concluded that such evidence was not sufficient to justify further modifications in Crouse's sentence. Citing the law of the case doctrine and the decision of the first appellate panel, the district court refused to allow additional argument concerning: (1) the reduction for community service; (2) the amount of loss calculations used to sentence Crouse; and (3) the effect of the new amendment to the sentencing guidelines. Because Crouse feels he was improperly denied another opportunity to argue these issues, he has appealed to us, seeking the remand of his case for a third sentencing hearing.

II

Legal questions related to a district court's decision to depart from the sentencing guidelines are reviewed de novo. *United States* v. *Brewer*, 899 F.2d 503, 506 (6th Cir.), *cert. denied*, 498 U.S. 844, 111 S.Ct. 127, 112 L.Ed.2d 95 (1990).

Crouse argues that the district court erred in applying the *Kohlbach* holding, because the court refused to consider whether Crouse's "expansion of the record" established that he was qualified for a departure based on community contributions. Crouse maintains that the district court interpreted *Kohlbach* as deciding that white collar defendants were per se barred from receiving sentencing departures based on community service. As a result of this understanding of *Kohlbach*, Crouse maintains, the district court failed to reconsider whether he was entitled to the community service departure pursuant to USSG § 5H1.11, on the basis of his new evidence. The record does, in fact, support the conclusion that the district court understood *Kohlbach* as completely removing its ability to depart based on community service in this case involving white collar defendants.

The government argues at length that the revisitation urged by Crouse is inconsistent with the law of the case doctrine. The law of the case doctrine precludes revisitation of an issue where: (a) the issue was expressly or impliedly decided on appeal, or (b) the appellate court's mandate to the lower court is so narrow in scope as to preclude the district court from considering the issue. *United States* v. *Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994).

Crouse, however, contends, and we agree, that the law of the case doctrine does not directly apply to resentencing. In *United States* v. *Duso*, 42 F.3d 365 (6th Cir. 1994), the court held that sentencing issues may be revisited *de novo* on remand from the court of appeals. *Duso* holds that a district court may revisit sentencing as it sees fit, as long as such revisitation is consistent with the appellate decision and mandate. In *Duso*, Judge Guy wrote:

> If the defendant convinces a court on appeal that the sentence was wrongly computed and the court

> remands for resentencing, there appears to be no prohibition in the guidelines, or in the case law interpreting the guidelines, keeping a district judge from revisiting the entire sentencing procedure unless restricted by the remand order. It is possible, as occurs in many cases, that the remand would be a limited one which would not allow the district judge to make a *de novo* review of the sentencing procedure. In this case, however, there was no such language in the opinion limiting the district judge's review.

Id. at 368.

The government's counter-argument concerning *de novo* resentencing and *Duso* is not compelling. The government contends that "[b]ecause the district judge [in *Duso*] had made a clear error at the original sentencing, *Duso* falls squarely within the third *Moored* exception to the law of the case doctrine." *Ibid.* There is nothing in the language of *Duso* cited above to suggest that its rule is limited to revisitation to correct clear error. *Duso* is therefore not a modification of *Moored*, but a separate rule applicable only to resentencing hearings allowing a district court to revisit sentencing issues on a *de novo* basis, as long as it remains consistent with the appellate mandate. As an appellate court, we correct errors of law, but do not remove all discretion and judgment from a district court. *Duso*, however, does not necessarily *require* revisitation in the Crouse matter.

To the contrary, we hold here that although the district court could have revisited the issue of departure for community service, its failure to do so in Crouse's case does not constitute reversible error because of our previous holding in *Kohlbach*. In *Kohlbach*, we explained forcefully that white-collar executives such as Crouse generally could not qualify for the community service departure even in light of extensive community service work. *Kohl-*

bach, 38 F.3d at 838-39. The basis for our reasoning was that corporate executives are commonly involved with community service and that the guidelines already take into account the nature of white collar crime and reward individuals who have previously led crime-free lives. *Id.* at 839. Although the district court here may have acted on an overly broad interpretation of *Kohlbach* (we can conceive of some situations in which a corporate executive could qualify for the community service reduction), the court was basically correct when it concluded that *Kohlbach* meant that Crouse, specifically, would not qualify for the reduction, based on the type of evidence before the court.

Crouse's initial effort to show that he performed significant community service was impressive, yet did not establish that he performed such quantity or quality of work as to set himself apart drastically from other similarly situated perpetrators. We have taken notice of Crouse's efforts to augment the record in this area, and remain convinced that the district court could reasonably invoke our decision in *Kohlbach* as foreclosing the need for further argument in this area.

While *Duso* may hold that Crouse could receive *de novo* resentencing, our mandate in *Kohlbach* was specific enough that the district court could reasonably conclude that Crouse would not qualify for the community service reduction. Even after the district court let Crouse put on additional testimony concerning his community service, it was and is still evident that he did not qualify for the reduction under the *Kohlbach* reasoning.

Although we noted the unfairness of a white collar defendant's getting "checkbook justice," by spending money or otherwise making token efforts at community service, the heart of our reasoning was that (a) departures such as this require *very* unusual circumstances, and (b) it is not unusual for white collar executives to have

a record of substantial community contributions because such activities are part-and-parcel of their positions, and the qualities that lead to an executive position are often those that also lead to useful community activity.

Crouse's new testimony tends to reflect that his community service was above average even for a corporate executive. We do not think, however, that this testimony adds much to what the trial court and first appellate panel knew about Crouse.[1] We need not set a specific standard for how far above average an executive's community service must be to qualify for this departure, but can say with confidence that Crouse's community service resume strikes us as not highly unusual for a person in his position. We acknowledge that the additional testimony established that Crouse undertook community service efforts at a relatively young age, and before he was an executive. We also acknowledge the fact that the testimony elevates him above the class of executives who donate only money, or lend only their name to a masthead. In the final analysis, however, we must be content to thank him for his generous efforts, but conclude that they are not sufficient to allow him to serve less time for the offense that he has committed.

III

Crouse also argues that an intervening amendment to the Sentencing Guidelines, Amendment 508, which went into effect after the *Kohlbach* decision, provided a grounds for departure that was rejected erroneously by the trial court. Amendment 508 adds the following paragraph to § 5K2.0, as well as additional commentary before and after the rule itself:

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[1] We also have a hard time understanding how, in light of our first opinion, Crouse can now find even more testimony to establish an even greater magnitude of community service. Holding back the extent of his services at the initial sentencing would serve no purpose, save possibly modesty.

> An offender characteristic or other circumstance that is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing.

USSG App. C., para. 508. Crouse maintains that this amendment changes the law controlling the issue of when departure for unusual circumstances is warranted, and that it applies to him because it took effect during the pendency of his direct appeal, pursuant to *Griffith* v. *Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987).

We believe it is unlikely, however, that this amendment would have led to any different result given the clarity and forcefulness of the *Kohlbach* decision. In *Kohlbach*, we decided there was not an unusual circumstance warranting departure, and the amendment and commentary seem to support this conclusion because they emphasize how rare such circumstances are. Crouse's argument is that the amendment could change this result, because the amendment says the circumstances are *rare*, therefore implying they do occur, contradicting the view that white-collar executives can never have qualifying community service. The *Kohlbach* court did not say that circumstances involving community service could never exist in such a way as to justify departure. Rather, *Kohlbach* holds that white collar executives must show that their community service was unusual based upon an expectation that such individuals would have engaged in a significant amount of such service. Amendment 508 in no way raises any questions about this result, and could not have been used in good faith by the district court to

avoid the conclusion drawn in *Kohlbach*, that Crouse's community service was not sufficiently unusual to warrant departure. As a result, the court's refusal to revisit the community service issue on the basis of this amendment was not error and in no way prejudiced Crouse.

IV

Finally, Crouse maintains that the district court's refusal to revisit the formula by which the loss attributable to Crouse was calculated constitutes error because the district court explained that it was legally precluded from such reconsideration. Again, under *Duso*, the district court is not so precluded, except to the extent that such revisitation conflicts with the appellate decision. Since the *Kohlbach* court reviewed the district court's method of computing loss for clear error, *Kohlbach*, 38 F.3d at 841, there was less danger that revisiting the loss issue could violate our specific holding that the previous ruling was within the court's discretion. Crouse submitted no new evidence on this issue, yet apparently hoped to convince the district court to adopt another formula for calculating loss.

While we agree that the district court erroneously concluded that it could not reopen this issue, we cannot agree that this amounts to an error that requires remand. This issue was fully and fairly litigated at the original trial, and was subject to appellate review during Crouse's first appeal. Crouse thus cannot claim that he has been denied his day in court on this issue. Crouse offers no reasoning, other than the arguments he made at these first two airings of this issue, why the district court might change its mind, or how the refusal to revisit has prejudiced him. In short, Crouse simply desires another chance to make the same arguments, and is upset that he was denied this chance because of the district court's misapprehension of the law governing resentencing. Without any showing of prejudice or any other compelling

reason why revisitation is necessary to effect justice, we believe the district court's mistaken justification for refusing revisitation constitutes harmless error. We therefore refuse to remand for further resentencing.

V

There comes a point in most cases where the relevant facts and legal positions are fully developed for the court, and beyond which further evidence and argument is an unprofitable investment. That point was reached in this case after the first appeal, when the district court was left with the administrative task of re-calculating Crouse's sentence. To turn such a task into an effort to re-litigate any of the closely-fought issues decided earlier by the district court, without substantially new evidence or argument, is contrary not necessarily to caselaw, but rather to common sense and the need for judicial economy. As the district court, in exasperation, explained at the resentencing, "none of this is new." Accordingly, we AFFIRM the decision of the district court in all respects.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. 1:93-CR-21

UNITED STATES OF AMERICA,
Plaintiff,

vs.

EDWARD B. CROUSE,
Defendant.

Resentencing

Before

THE HONORABLE ROBERT HOLMES BELL
United States District Judge
February 7, 1995

* * * *

[3] PROCEEDINGS

THE COURT: The next matter is the matter of *United States v. Edward Crouse.* This is our docket 93-CR-21. Mr. Delaney is here representing the United States Attorney's Office and Mr. Dodge is here representing Mr. Crouse, and Mr. Bratt has come here to witness these proceedings all the way from Washington, D.C.

We are here in this file 93-CR-21 as a result of a return mandate from the Sixth Circuit reversing this Court's sentence. This Court has read and reread the opinion numerous times; has read the footnotes many, many times, attempting to reconcile the footnotes, if possible, with the body of the opinion; notes that on Page 12 of that opin-

ion the guidelines range under the euphemistic Sentence Guidelines, being the Sentence Reform Act of 1984, was spelled out. Page 20 the remand took place, and in that remand, the remand is for resentencing consistent with this Court's original opinion.

This Court has reviewed the body of both the Defendant Crouse's sentencing memorandum and the response [4] thereto. This Court has reviewed extensively what was presented to this Court as the body of this Court's—what this Court thought was very detailed findings at the time of the original sentence.

It appeared to this Court consistent with a line of cases, *McKelvey* and a line of other cases, that this Court had the ability to depart on atypical matters, and in this case the Court departed on the quality of the defendant's community contributions as well as proportionality. The Court of Appeals decision rather forthrightly disagreed with this Court's allocation of departure based upon the quality of community contributions, and the Court went to some length to indicate particularly, as they called it, white collar persons, and obviously Charles Keating was lumped in and several others, that this was not to be a consideration in this matter on remand. That becomes abundantly clear.

And while I can appreciate defendant's counsel's articulation in the request for a hearing *en banc* and I can appreciate the articulation when it comes back here to me today, I don't think I have the ability to go back and review both the amount calculation of what was called fraud, nor do I have the ability to go back and look at departures based upon community service. The Court has indicated that that apparently is not a factor in these kinds of matters. So therefore, I place that on the record that my function here [5] is, perhaps frustratingly, but it's extremely limited.

* * * *

[30] THE COURT: The mandate from the United States Court of Appeals for the Sixth Circuit gives the

Court the order to proceed back to the guideline range and a criminal history level that was achieved by this Court before departure. This Court was specifically instructed both on the last page 20 and on page 12 to not depart.

I am going to depart four levels downward here because I am going to conclude under the *Miller* case that has been cited that the service of time here on home confinement—which, interestingly, the Court of Appeals says only 12 months home confinement—I find was a home confinement unlike the sentence guidelines that tell me that home confinement is different than prison confinement. Home confinement under guideline terminology refers to releases for work and releases for children's activities and other such things. The home confinement that this Court ordered for Mr. [31] Crouse did not have release privileges as a matter of ordinary course. So therefore, it would be this Court's conclusion that in fact the home confinement was analogous in its construction of activities to that of a confinement within an institutional setting.

Therefore, the Court would be of the belief that it is equivalent to an institutional setting, and to not include that or deduct that on a resentence from the guideline amount would in fact place the defendant here in double jeopardy or double sentencing, and that is not the Court's intention, nor does this Court hope that that was the Sixth Circuit's intention that this Court would do. This Court—the Sixth Circuit never addressed that question. But as counsel for the defendant ably stated, had this Court permitted Mr. Crouse to post a bond until the Sixth Circuit had finished with their work, nothing would have been served and we would have been back here in a different posture than we are now, and that change of posture; i.e., service of one year of supervised release, has to be credited. To do it otherwise would be unjust and potentially jeopardous of the proper due process calculations.

Therefore, it would be this Court's downward departure to a level 15 under the 1987 sentence guidelines and the mandate from the Sixth Circuit such that an 18-month custody in the Federal Bureau of Prisons would be mandated by [32] the Sixth Circuit's order to this Court.

This Court would make two recommendations to the Federal Bureau of Prisons. One would be a recommendation for placement at a facility near family members, and I would presume, Mr. Dodge, that you'd be able to give us that information as we prepare this sentence.

Secondly, this Court is going to take an unusual method here of encouraging early furlough release premised upon successful completion of electronic monitoring from 12/1/93 to 12/1/94.

This Court is going to establish a supervised release period of one year following the custody, but will require under the particular provisions of 18 U.S.C. 3583 that the normal reporting requirements be relaxed such that there be informal reporting phoned in, phoned in and in writing without travel restrictions due to the successful completion of electronic monitoring. So that one year of supervised release is an informal supervised release.

Secondly, the fine of $250,000 has been paid and therefore it remains academic at this point, but it will be placed into the record. The mandatory special assessment of $50 has been paid. That will be placed into the record as well.

There is a right of appeal which may be taken forthwith by this defendant of this resentencing. I will [33] permit self-surrender within the next 90 days to an institution as designated by the marshal's office. Should there be an appeal from this sentence, the bond may be posted of $10,000 cash or surety in the event bond is posted in this matter.

* * * *

APPENDIX C

[Filed May 14, 1996]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 95-1189

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

EDWARD BOYLES CROUSE,
Defendant-Appellant

ORDER

BEFORE: BOGGS and DAUGHTREY, Circuit Judges; and MATIA,* District Judge.

Upon consideration of the motion filed by the appellant to stay the mandate pending the filing of a Petition for Writ of Certiorari,

It is ORDERED that the motion be, and it hereby is; GRANTED. The mandate is stayed for thirty days from this Order unless the Court is advised that the Petition for Writ of Certiorari has been filed.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

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* Hon. Paul R. Matia, United States District Judge for the Northern District of Ohio, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Nos. 93-2495, 93-2531, 93-2550 and 93-2564

UNITED STATES OF AMERICA,
Plaintiff-Appellant (93-2495/2531),
Cross-Appellee,

v.

FRIEDRICH R. "FRED" KOHLBACH,
Defendant-Appellee,

EDWARD B. CROUSE,
Defendant-Appellee,
Cross-Appellant (93-2550),

JAMES R. MARSHALL,
Defendant-Appellant (93-2564).

Argued June 23, 1994

Decided Oct. 19, 1994

Rehearing and Suggestion for Rehearing En Banc
Denied Dec. 14, 1994 in
Nos. 93-2531, 93-2550, 93-2564

Before: KEITH, BOGGS, and BATCHELDER, Circuit Judges.

BOGGS, Circuit Judge.

Defendants Kohlbach, Crouse, and Marshall pleaded guilty to federal charges arising from a conspiracy to produce and introduce into interstate commerce adulterated "orange juice made from concentrate." The government appeals from the sentences imposed on Kohlbach and Crouse, claiming that they were lighter than mandated by the United States Sentencing Guidelines. Crouse cross-appeals, and Marshall appeals, both claiming that the district judge incorrectly determined the total loss caused by the conspiracy, and consequently imposed a sentence harsher than that authorized by the guidelines. For the reasons set forth below, we: (1) remand the matter of Kohlbach's sentencing to the district court for further findings of fact; (2) vacate Crouse's sentence and remand for resentencing; and (3) affirm the findings of loss because they are not clearly erroneous.

I

Kohlbach, Crouse, and Marshall were named among seven persons and two corporations charged in a 33-count indictment with conspiring to violate the Federal Food, Drug, and Cosmetic Act ("FDCA") by selling adulterated orange drinks as "orange juice from concentrate." The Food and Drug Administration ("FDA") is authorized by Congress to establish definitions and standards for food products whenever "such action will promote honesty and fair dealing in the interest of the consumer. . . ." 21 U.S.C. § 341.

The FDA has chosen to define standards for orange juice. Under 21 C.F.R. § 146.145, "orange juice from concentrate" may consist only of water, concentrate orange juice, orange juice, orange pulp, orange oil, and orange aroma (also called "orange essence"). Thus, it is forbidden to add sugar, pulpwash,[1] citric acid, amino

[1] Orange pulpwash is a term of art that refers to the liquid that remains after water has been forced through the residue of

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acids, enzymes, or preservatives to a product called "orange juice from concentrate." Under the law, it is not relevant whether the forbidden additives improve the product's quality. As a separate but related matter, the antibiotic natamycin (marketed under the trade name "Delvocid") has been approved by the FDA for use on the surface of cheese but in no other food substance. *See* 21 C.F.R. § 172.155.

Flavor Fresh Foods, Inc. ("Flavor Fresh"), contracted with the Peninsular Products Company ("Peninsular") to process Flavor Fresh's "100% orange juice from concentrate" by adding the appropriate amount of water, and to pack and market the finished product. Defendant Marshall was one of Flavor Fresh's owners and a company vice-president. Marshall had been in the orange juice business for three decades. Sometime around the early 1970s, he developed formulas for adulterating orange juice. During this period, he first met defendant Kohlbach, a German scientist specializing in food biology.

Meanwhile, Peninsular also produced and distributed its own in-house "orange juice from concentrate," marketed as "Orchard Grove." Defendant Crouse was the owner of Peninsular, the chairman of its board of directors, and its chief executive officer. Crouse delegated responsibility for Peninsular's day-to-day activities to others, especially co-conspirator Wagoner, Peninsular's general manager.[2] While Wagoner ran Peninsula's operation from the company's main office in Michigan, Crouse increased his presence in Florida, where he had an office, monitoring groves and developing financial information. Crouse still visited Michigan periodically during the year, to attend Peninsula's quarterly board meetings and to pur-

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juice processing. Such residue includes the skin, the peel, the pulp, and other solids that remain after the juice has been squeezed from oranges during processing.

[2] Wagoner was convicted and sentenced in separate proceedings that are not part of this appeal.

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sue other personal charitable, civic, and religious interests. Nevertheless, Wagnoner kept Crouse apprised of the company's adulterating schemes, and Crouse understood that Peninsular was violating federal law.

According to the indictment, Flavor Fresh first began to dilute its "100% orange juice from concentrate" by adding beet sugar and by infusing other additives, including amino acids and flavor enhancers, to foil federal detection. Subsequently, Marshall contracted with Kohlbach to purchase, and to market to others, a sophisticated preservative that could extend the shelf life of "orange juice from concentrate" from four weeks to as long as seven weeks.

Kohlbach devised and supplied the preservative, whose main ingredient was glucose oxidase/catalase, a natural enzyme that extends the product's life by inhibiting oxidation. Kohlbach's preservative also included natamycin, an antibiotic that further extends shelf life by killing microbes and molds that are present in orange juice concentrate. Kohlbach described his compound as being so potent that it contained "one bullet for every bug." By adopting this method to extend product shelf life, Flavor Fresh and Peninsular saved costs by eliminating the need to sanitize and upgrade their production facilities, and they further avoided the losses that their competitors incur when the shelf life of unadulterated orange products expires. In addition, Kohlbach sold and provided maintenance service for a "dosing machine" that he created to inject measured amounts of preservative into the concentrate, and he devised a formula by which enough extra orange aroma was added into the enzyme-and-natamycin additives to mask the alterations. He shipped his preservative to Flavor Fresh, invoicing it as a "cleansing and aseptisizing compound." In turn, Flavor Fresh sold some of the preservative to Peninsular, shipping it as a "flavoring compound."

Shortly after Flavor Fresh began working with Peninsular in 1979, Marshall informed Wagoner that he was adulterating his concentrate by adding beet sugar. Nevertheless, Peninsular continued to market it as "100% orange juice from concentrate." In fact, around 1983, Peninsular chose to increase the profit margin on its own in-house "Orchard Grove" label by purchasing adulterated concentrate from Fresh Flavor. In time, Peninsula obtained more than three million gallons of the Flavor Fresh concentrate, the base ingredient from which it produced approximately 37 million gallons of finished product. In 1990, Peninsular began adding pulpwash to its concentrate. However, in early 1991, an FDA inspector caught Peninsular employees adding the pulpwash. An investigation followed, leading to criminal indictments against Defendants.

The Food, Drug, and Cosmetic Act makes it a federal crime to "adulterate" a food by substituting a component, or by adding any substance to it that "reduce[s] its quality or strength, or [that] make[s] it appear better or of greater value than it is." 21 U.S.C. § 342(b). It is also a federal offense to introduce "adulterated or misbranded" food into interstate commerce. *Id.* § 331(a). Section 333(a)(2) makes it a felony to violate § 331(a) while acting "with the intent to defraud or mislead."

Desiring to avoid trial on the 33-count indictment, Kohlbach and Crouse both pleaded guilty to count 15 only, admitting that, with the intent to defraud or mislead, they caused adulterated orange juice to be introduced into interstate commerce. 21 U.S.C. §§ 331(a), 333(b) (recodified as § 333(a)(2) after July 22, 1988). Marshall pleaded guilty both to that count and to count one, conspiracy to violate the FDCA. 21 U.S.C. § 371. The defendants were sentenced separately, and the issues on this appeal arise from those sentences.

II

Kohlbach pleaded guilty to count 15 of the indictment, which charged that with the intent to defraud or mislead, he caused adulterated orange juice to be introduced into interstate commerce. 21 U.S.C. §§ 331(a), 333(b) (recodified as § 333(a)(2) after July 22, 1988). It was agreed by the parties that, based on the dates of his offenses, he would be sentenced under the 1987 guidelines.

Under U.S.S.G. § 2F1.1(a), an offender whose crime involves fraud or deceit is assigned a base offense level of 6. That offense level is further increased based on the amount of loss caused, with incremental sentencing enhancements pegged to higher thresholds of loss. When a district court calculates the amount of loss caused by a crime involving fraud or deceit, the court need not determine the amount of loss with precision. *United States* v. *Milligan*, 17 F.3d 177, 183 (6th Cir.1994) (citing § 2F.1, comment. (n.8)). "The guidelines require a district court to make a reasonable estimate, which may be founded on general factors such as the nature and duration of the fraud." *Ibid.*

The government urged the district judge to adopt the recommendation of the Pre-Sentencing Investigation (PSI) that Kohlbach's base offense level of 6 under U.S.S.G. § 2N2.1(b)(1) (1987) be enhanced by 11 levels under § 2F1.1(b)(1)(L) (1987) for the specific offense of perpetrating a fraud that exceeded $5 million. The judge refused, finding that it would "turn the statute on its head" to enhance Kohlbach's offense level based on a quantity of criminality to which he had "no proprietary nexus of gain." Furthermore, because the judge was satisfied that no one had been hurt by Kohlbach, he rejected the government's suggestion to add two levels under U.S.S.G. § 2F1.1(b)(2)(B) (1987), for a crime to defraud more than one victim. On the other hand, the judge did agree to enhance the base offense level by two

on the grounds that Kohlbach's crime required the use of special skill related to his scientific knowledge. U.S.S.G. § 3B1.3. Thus, the district judge found a total offense level of 8 for Kohlbach's crimes, rejecting the government's argument for finding a base offense level of 21.

In rejecting the government's suggestion that he impose the statutory maximum sentence of three years,[3] the judge opined that 21 U.S.C. § 333(a)(2) contemplates more serious offenses than Kohlbach's, and he described the law as a class E felony and a "minor statute." He sentenced Kohlbach to eight months of home confinement, one year of supervised release, and a $100,000 fine.[4] The judge further ordered Kohlbach to leave the United States after serving his sentence and paying his fine, and recommended that Kohlbach be barred from future entry.

The record reflects that the judge perceived Kohlbach as a scientist of some standing who had been consulted on matters relating to food preservation and who did not intend to cause loss. Moreover, Kohlbach had no connection with the decision to infuse beet sugar into the orange juice concentrate. Rather, he provided the enzymes and antibiotics that extended shelf life while inhibiting microbes, molds, and oxidation. In an exchange with the government's attorney at the sentencing hearing, the district judge persistently explored whether Kohlbach's role had actually harmed anyone:

> THE COURT: Did the preservative work as was anticipated?
>
> MR. BRATT [the government attorney]: It worked tremendously well, Your Honor. . . .

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[3] The sentencing range for a defendant with a criminal history in category I, and a total offense level of 21, is 37-46 months.

[4] The 1987 guidelines indicate a sentence of 2-8 months for an offense level of 8 and a criminal history category I. A criminal in that range may be sentenced to home confinement. *See* U.S.S.G. § 5C1.1(c), (e).

THE COURT: And the harm to the public?

MR. BRATT: The harm to the public is that the public wants to buy a product that—

THE COURT: Harm to the public.

MR. BRATT: The harm to the public—

THE COURT: Danger, health hazards to the public.

MR. BRATT: This was never charged as—the harm is purely economical.

THE COURT: Well, we're beyond what's being charged. . . . My question to you is harm to the public, physical endangerment of health. I think that's what the whole FDA is premised on, harm to the public.

MR. BRATT: Your Honor, I would beg to differ in this area.

THE COURT: Excuse me. Answer my question, Mr. Bratt.

MR. BRATT: There was *no harm to the public* as far as we know. We have not charged that.

THE COURT: Okay. You may continue.

J.A. at 299-300 (emphasis added). Furthermore, the judge noted Kohlbach's dignified demeanor throughout the proceedings.

Nevertheless, although the judge felt that Kohlbach played a smaller role and benefited less from the scheme than did the other defendants, our review of the record indicates that Kohlbach may have profited significantly from payments that he received as a consultant, from the marketing of his preservative to Marshall, and from the sale and maintenance of his "dosing machine" and related equipment. Unfortunately, the record on appeal sheds no light on whether, or to what degree, he profited

from this venture. Nor does the record reflect the monetary amount of loss caused by Kohlbach's fraud and deceit. Therefore, we remand this matter to the district judge for further findings of fact to determine, based on the amount of loss caused by Kohlbach's fraud, whether Kohlbach's offense level should have been enhanced under the terms of U.S.S.G. § 2F1.1(b)(1).

III

Like Kohlbach, Crouse was sentenced under the 1987 guidelines. The PSI recommended that Crouse be assigned a total offense level of 23, comprised of: (1) a base offense level of 6 for violating the FDCA, U.S.S.G. §§ 2N2.1; 2F1.1(a); (2) a specific-offense level increase of 11 because the amount of loss caused by the fraud was approximately $10.3 million, an amount in excess of $5 million, *id.* § 2F1.1(b)(1)(L); (3) a 2-level enhancement for perpetrating a scheme to defraud more than one victim, id. § 2F.1(b)(2)(B); (4) a 4-level enhancement for being the organizer or leader of a criminal activity that involved five or more persons, *id.* § 3B1.1(a); (5) a 2-level enhancement for obstructing justice by making false statements to the grand jury that investigated the charges leadng to the indictment, *id.* § 3C1.1; and (6) a 2-level reduction for accepting responsibility, *id.* § 3E1.1(a). A total offense level of 23, with a criminal history category of I, carries a guidelines sentencing range of 46-57 months. However, the statutory ceiling for this class E felony would limit Crouse's prison term to a maximum of 36 months. 21 U.S.C. § 333(a)(2); U.S.S.G. § 5G1.1(a).

Despite the government's recommendation, the district judge departed downward. The judge, who noted for the record that he had personally been an active participant in the community life of Lansing, Michigan, earlier in his career, commented on Crouse's prominent role in that community. The judge had received a substantial num-

ber of letters from religious, civic, and legal figures, appealing for mercy; the letters spoke of Crouse's good deeds and claimed that he had previously manifested high ethical behavior and a sterling character, even when conducting personal business dealings.

The judge found that Crouse's community ties, civic and charitable deeds, and prior good works merited a substantial downward departure in sentence, even though such considerations "are not ordinarily relevant in determining whether a sentence should be outside the applicable guidelines range." U.S.S.G. §§ 5H1.6, 5H1.11. Furthermore, the judge noted that Crouse had lost his equity interest in the multi-million-dollar business that he had built;[5] had been forced to resign as director of a bank, suffering both embarrassment and the loss of director's fees; had been compelled to give up other prominent positions of communal leadership; and had suffered the anguish of seeing his name deeply tarnished in a community where his reputation had once been sterling. Moreover, the judge explained that he strove for proportionality in sentencing, in light of other sentences being handed down to co-conspirators.

Consequently, the district judge sentenced Crouse to a 12-month term of home confinement. The judge also assessed a $250,000 fine. Although at first he did not make itemized offense-level findings under the guidelines, the judge acceded to the government's request that he do so, and he found a total offense level of 19, comprised of:

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[5] The government notes that Crouse enjoyed good wages during the height of the scheme: $139,814 (1983); $194,126 (1984); $238,184 (1985); $401,600 (1986), and $610,067 (1987). The government challenges the finding that Crouse lost equity in his business as a result of the scandal. In 1989, before the crimes had come to light, the business had been audited, and its value had been approximated at less than $3 million. Crouse sold the business in 1992 for $3.5 million. Thus, Peninsular's value held up through the scandal. In any event, it is not unusual that a business built in significant part on fraud will suffer once the fraud stops.

(1) a base offense level of 6 for violation of the FDCA, U.S.S.G. § 2N2.1(a); (2) an 11-level specific-offense increase for a fraud that caused over $5 million in losses, *id.* § 2F1.1(b)(1)(L); (3) a 2-level enhancement apparently under *id.* § 3B1.1(c),[6] for playing a leadership role that was less extensive than that described by the government; (4) a 2-level enhancement for more than minimal planning, *id.* § 2F1.1(b)(2)(A); and (5) a 2-level reduction for acceptance of responsibility, *id.* § 3E1.1(a). The judge found that Crouse had not intended to lie to the grand jury when he incorrectly answered a brief flurry of questions; indeed, the judge criticized the questions as being constructed in a complex and unclear manner.[7]

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[6] U.S.S.G. § 3B1.1(c) calls for a two-level enhancement if a defendant was an organizer, leader, manager, or supervisor in a criminal activity that did not involve at least five participants and that was not "otherwise extensive." If the criminal activity did involve five or more participants or was "otherwise extensive," the enhancement is three levels for a "manager or supervisor," *id.* § 3B1.1(b), or four levels for an "organizer or leader," *id.* § 3B1.1(a). Although this case clearly involved five or more participants and was quite extensive, the government has not appealed this aspect of Crouse's sentencing. Indeed, the government specifically cites Crouse's two-level enhancement as an appropriate way by which the district judge differentiated between the relative culpability of Crouse and Marshall. *See* Brief for Appellant (No. 93-2531) at 28.

[7] Crouse had been asked, "Prior to March of 1991, did you have any *personal knowledge* of adulterants being used in the products at Peninsular Products including pulpwash, sugars, antibiotics, preservatives, Delvocid?" (Emphasis added.) He responded negatively. The judge found that such a reply could have been honest if Crouse intended by his answer to convey that Peninsular had not added all five adulterants. Furthermore, the judge found that Crouse could have understood "personal knowledge" to imply a level of first-hand involvement that he had not undertaken. Elaborating, the judge explained that, while he knew that President John F. Kennedy had been assassinated in Dallas, Texas, on November 22, 1963, he would not go so far as to say that he had "personal knowledge" of those events. In addition, the judge ob-

The guidelines assign a sentencing range of 30-37 months for a criminal with a total offense level of 19 and a criminal history category I. Home confinement is not a sentencing option in that sentencing range. Having sentenced Crouse to only 12 months' home confinement, the district judge then stated, for the record, that he was departing downward by six levels, based on the § 5H1 factors, in order to reach a sentencing range that encompasses a 12-month sentence.[8] However, as the government later argued, the judge had departed even lower, *de facto*, because the guidelines do not allow home confinement as a prison substitute for offense level 13. *See* U.S.S.G. § 5C1.1.

The government appeals from Crouse's lenient sentence, citing this court's prior opinions that a defendant's socio-economic status may not be the basis for a departure. *United States* v. *Rutana*, 932 F.2d 1155, 1158 (6th Cir.), *cert. denied*, —— U.S. ——, 112 S.Ct. 300, 116 L.Ed.2d 243 (1991). Rather, to justify a downward departure based on "unusual factors" that the guidelines have already considered, such as those considered in § 5H1, a district court must find those factors to be present "substantially in excess of that which is *ordinarily involved in the offense of conviction.*" *United States* v. *Brewer*, 899 F.2d 503, 506 (6th Cir.) (emphasis added), *cert. denied*, 498 U.S. 844, 111 S.Ct. 127, 112 L.Ed.2d 95 (1990). In this case, the district judge made such a determination.

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served that Crouse had come before the grand jury under a subpoena *duces tecum*, not expecting to be further interrogated. Therefore, it would be understandable that Crouse might have failed to understand the scope or implications of the flurry of questions asked. Although the government appeals from the judge's finding that Crouse did not *intend* to obstruct justice by lying to the grand jury, we do not consider this finding to be clearly erroneous.

[8] Under criminal history category I, an offense level of 13 calls for a prison term of 12-18 months. The next higher offense level prescribes a term of 15-21 months.

In reviewing the sentence, we apply our three-step *Joan* analysis. *United States* v. *Joan*, 883 F.2d 491, 494 (6th Cir.1989); see also *United States* v. *Fletcher*, 15 F.3d 553, 556 (1994). We first determine "whether the case is sufficiently unusual to warrant a departure." *United States* v. *Barnes*, 910 F.2d 1342, 1345 (6th Cir. 1990). In other words, we ask whether the district court relied upon circumstances that are "of a kind or degree that may appropirately be relied upon to justify departure." *United States* v. *Belanger*, 892 F.2d 473, 475 (6th Cir. 1989). This inquiry is a question of law that we review de novo. Second, we consider whether the circumstances that would warrant departure "actually exist" in the present case. This assessment involves factfinding, and the district court's determinations are reviewed only for clear error. Finally, if necessary, this court "measure[s the district court's] degree and direction of departure from the Guidelines" to determine whether it meets a standard of reasonableness. *Ibid.*

In this case, focusing on the first two steps of the *Joan* test, the government argues that Crouse's community ties, civic and charitable deeds, and prior good works were not "substantially in excess of that which is ordinarily involved in the offense of conviction." We need not reach the second and third steps of the *Joan* test because we agree that the circumstances on which the district judge relied to depart below the guidelines were not of a sufficiently unusual kind or degree that warranted a departure. Rather, it is *usual* and *ordinary*, in the prosecution of similar white-collar crimes involving high-ranking corporate executives such as Crouse, to find that a defendant was involved as a leader in community charities, civic organizations, and church efforts. *See, e.g., United States* v. *McHan*, 920 F.2d 244, 248 (4th Cir.1990) (criticizing the notion that white-collar criminals "need only write out a few checks to charities and then indignantly demand" sentencing reductions, and further observing that the

"very idea of such purchases of lower sentences is unsavory").

Indeed, in one recent case, a white-collar criminal contributed $1 million to the missionary efforts of Mother Teresa, the Nobel Peace Laureate.[9] Subsequently, both Mother Teresa and a representative of the Vatican wrote letters to the sentencing judge, attesting to the convicted banker's charitable works and integrity. *See* Ted Johnson & Anne Michaud, "Buyers of Bonds Remain Bitter, Unsatisfied," *L.A. Times,* Apr. 11, 1992, at A1:6. Similarly, in this case, the government augments its appeal from Crouse's comparatively light sentence by showing that co-defendant Marshall's associates and acquaintances also wrote testimonial letters, showering encomia upon *him* for *his* charitable works, community involvements, public good deeds, and church activities. The government contends that such letters did not prevent Marshall from receiving a prison sentence, and similar correspondence should not benefit Crouse either.

We agree that the sentencing guidelines already considered the nature of white-collar crime and criminals when setting the offense levels that govern this offense. Furthermore, the guidelines reward defendants who have lived previously lawful lives by setting substantially lower sentencing ranges for them than those suggested for past offenders. For example, Crouse faces a prison term that is less than half the sentence he would face if he had accrued thirteen or more criminal history points.

The record shows that Crouse has performed many fine deeds in his life and has won the devotion and admiration of people whom he has helped and who have

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[9] *See generally* David B. Fischer, "Bank Director Liability Under FIRREA: A New Defense for Directors and Officers of Insolvent Depository Institutions—or a Tighter Noose?" 39 *UCLA L.Rev.* 1703, 1707 n. 21 (1992) (discussing Charles H. Keating, Jr., and the failed Lincoln Savings & Loan Association of Irvine, California).

honored him with positions of community leadership. However, he also has derived well over $1 million in income from Peninsular during the years of the adulteration scheme. *See supra* note 5. He has also victimized orange juice drinkers in Lansing. Indeed, Wagoner conceded earlier that Lansing school children were served Crouse's product with their government-subsidized lunches. By serving a sentence within the range prescribed by the guidelines, he will do no more than pay an outstanding debt, one that he owes the society that gave him the opportunity to achieve success.

IV

Crouse cross-appeals, and Marshall appeals, from the district judge's specific-offense findings that the scheme resulted in a loss that exceeded $10 million. Those findings resulted in an 11-level increase in Crouse's total offense level (based on the 1987 guidelines) and in a 15-level increase in Marshall's total offense level (based on the 1992 guidelines, under which the parties agreed that Marshall would be sentenced).[10]

A

The judge found the amount of loss by accepting the "ingredient-substitution method," a mathematical formula proposed by the government. The government presented statistics showing the *wholesale* price per pound of pure orange concentrate ("orange juice soluble solids") dur-

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[10] The 1987 guidelines, under which Crouse was sentenced, provide: a 9-level increase for offenses involving fraud and deceit that result in losses exceeding $1 million; a 10-level increase for losses exceeding $2 million; and an 11-level increase for losses exceeding $5 million. U.S.S.G. § 2F1.1(b)(1)(J)-(L) (1987). The 1992 guidelines, under which Marshall was sentenced, add 12 levels for losses exceeding $1,500,000; 13 levels for losses exceeding $2,500,000; 14 levels for losses exceeding $5,000,000; and 15 levels for losses exceeding $10,000,000. U.S.S.G. 2F1.1(b)(1)(M)-(P) (1992).

ing the time of the conspiracy, and the *wholesale* price per pound of invert beet sugar during that period.[11] The government then showed that at least 36,616,814 gallons of adulterated orange juice had been produced by the conspirators between 1984 and 1990, and that at least 9,571,033 pounds of sugar were in those adulterated gallons of orange juice. By multiplying the minimum pounds of sugar that were contained in the adulterated mixtures, by the difference in the wholesale price per pound between orange juice soluble solids and bulk refined beet sugar, the judge determined that the conspiracy had resulted in losses to consumers of approximately $10.3 million.

Crouse and Marshall appeal from the method adopted by the judge, noting that the government had earlier persuaded a different district judge, who had sentenced other co-conspirators including Wagoner, to use the "retail-price method," a different mathematical formula. In those prior cases, the government had presented statistics contrasting the *retail* price per gallon of pure orange *juice* and the *retail* price per gallon of orange *drink*. Those calculations showed a $45 million loss. The government suggested to Crouse's and Marshall's probation officers that they use the same "retail-price method" in preparing the defendants' PSIs. However, Crouse and Marshall pointed out that the government had been contrasting the retail price of premium, brand-name, nationally advertised orange juice, such as "Tropicana" and "Minute Maid," as opposed to the retail price of "Sunny Delight," a lower-quality orange dring that contained less than 10% real fruit juice in its ingredients. Defendants' attorneys argued that the judge should instead consider the average

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[11] The government's evidence showed that the price of orange juice tended to fluctuate between $1.00 and $2.00 per pound of soluble solids during the period of the conspiracy. During that same time frame, bulk refined beet sugar sold within a relatively steady range between $0.30 and $0.35 per pound.

retail price of generic, low-priced, private-label orange juice and contrast those numbers to the retail price of higher-priced orange drinks that contain greater percentages of real fruit juice. Defendants' attorneys contended that Flavor Fresh's and Peninsular's juice products were in the private-label family and that their diluted final products still contained more than 60%, often as much as 75%, pure orange juice.

The government first responded by submitting a reduced retail price of orange juice, taken directly from *The Marketing Fact Book*, based on all orange juice retail sales in the United States. Under this formula, the loss still came to $26 million. However, the defendants' attorneys responded that the new statistic was still heavily weighted by the premium brands, which account for 60% of the nation's orange juice sales, and thus remained an unrealistic comparison for Flavor Fresh and Peninsular.

Consequently, the government presented and the judge accepted the alternative "ingredient-substitution method" described above, by which the *wholesale* price per pound of invert beet sugar is subtracted from the price of pure orange concentrate, then multiplied by the pounds of sugar estimated to have been added to the 37 million gallons of adulterated juice, in order to arrive at the $10.3 million loss that the district judge ultimately adopted.

On cross-appeal, Crouse claims first that consumers suffered no losses. He cites at least three orange *drinks* with high amounts of real juice that bore higher retail prices than did private-label orange juice from concentrate. Therefore, he argues that consumers who purchased Flavor Fresh's or Peninsular's adulterated "orange juice from concentrate" would have *saved money* by buying defendants' products, which could have been sold as orange drink and which still contained more real juice than did the three higher-priced orange *drinks*. However, the government presented statistics from a survey con-

ducted by the A.C. Nielsen company for the Florida Department of Citrus, showing that 66% of consumers who purchase orange *juice* would not knowingly accept orange *drink* as a substitute. Therefore, if consumers realized that Flavor Fresh's and Peninsular's products were orange drink, not orange juice, they would be more likely to turn to other juice products than to other drink products, even if, in the eyes of some marketers and economists, they should have happily taken the adulterated Flavor Fresh. Furthermore, the three higher-priced orange drinks proffered by Defendants for comparison—"Tropicana Twister," "5-Alive," and "Hi-C"—are themselves name-brand, nationally advertised products, in contrast to the Flavor Fresh and Peninsular products.

Second, Crouse argues that this court should ultimately regard all of the various government estimates and statistics to be grossly speculative. Crouse notes that some defendants were sentenced on the basis of $45 million in losses (using the retail prices of premium, name-brand orange juice), and others on the basis of $10.3 million in losses (using the wholesale prices of orange concentrate and invert beet sugar). Furthermore, Crouse points to other statistics that were propounded, showing everything from $26 million in losses (using the national average retail price found in *The Market Fact Book*) to a figure of under $2 million, based only on the losses suffered by Flavor Fresh's and Peninsular's business competitors. Therefore, Crouse claims that "it is clear that the estimates are the product of guess, speculation, and conjecture."

B

In reviewing on appeal the district court's determination that Crouse and Marshall caused more than $10 million in losses by their deceit and fraud, we again note that "[l]oss need not be determined with precision." *Milligan*, 17 F.3d at 183; U.S.S.G. § 2F1.1, comment. (n.8). In allowing the district judge a measure of lati-

tude in determining the amount of loss caused by a crime that involves fraud or deceit, we have stated:

> The guidelines require a district court to make a reasonable estimate, which may be founded on general factors such as the nature and duration of the fraud.
>
> The sentencing guidelines define a product's fair market value as the value of the victim's loss, and in situations involving fraud, to determine fair market value the district court may consider probable or intended loss.

Ibid. (citations omitted); accord *United States* v. *Tardiff*, 969 F.2d 1283, 1288 (1st Cir.1992) ("Under the best of circumstances, a defendant who challenges such a finding has an uphill struggle. . . . [H]e must carry the burden of satisfying us that the court's evaluation of the loss was not only inexact, but was outside the universe of acceptable computations.").

We review a district court's interpretation and application of the sentencing guidelines *de novo*. After determining the meaning and scope of the guidelines, we review the district court's factual findings underlying the sentence for clear error. *United States* v. *Robinson*, 898 F.2d 1111, 1116 (6th Cir. 1990).

Upon our review of the district court's application of the "ingredient-substitution method" in this case, we cannot say that the court's determination of loss was clearly erroneous. The government presented documented wholesale prices and detailed statistical analyses. Although Crouse and Marshall point to discrepancies in different analyses of loss, those differences are attributable to different theories of which loss to measure. Furthermore, the government's numbers did not consider the additional losses perpertated by the defendants, who also used their same illegal processes to adulterate *other fruit drinks* they

produced, including adulterated apple juice, adulterated grapefruit juice, adulterated pineapple juice, adulterated cranberry juice, and adulterated grape juice. Moreover, the government's statistics gauged the loss beginning only from 1983 because there were no records that showed the amount of adulterated juice that had been shipped between 1979, when the conspiracy began, until 1983. And the government statistics also did not include the losses caused in 1990 and 1991 when Peninsular diluted its concentrate with pulpwash. Therefore, we cannot say that the judge, in finding that Crouse's and Marshall's fraud caused more than $10 million in losses, was "clearly erroneous."

Marshall further argues that, even if the "ingredient-substitution method" is not clearly erroneous, the wholesale price of orange concentrate should have been offset by *all of the ingredients* added into the Flavor Fresh and Peninsular drinks. Thus, in addition to deducting the wholesale price of invert beet sugar, the government and district judge should have subtracted the wholesale prices of such other additives as the amino acids, vitamins, and flavor enhancers that went into the product substituting for the pure concentrate. On one level, Marshall's argument seems reasonable. Beet surgar alone did not replace the reduced concentrate. However, we agree with the government that Marshall's request is akin to a securities-fraud criminal asking the court to offset the expenses incurred in creating, printing, and mailing the false securities. Indeed, in this case, certain flavor enhancers and additives were infused primarily to conceal from consumers and the government the fact that pure orange content had been reduced in the finished product.

V

For the foregoing reasons, we REMAND the matter of Kohlbach's sentencing to the district court for further findings of fact consistent with this opinion. We VA-

CATE Crouse's sentence and REMAND for resentencing consistent with this opinion. Finally, we AFFIRM the district judge's findings concerning the amount of loss caused by the fraud of Marshall and Crouse, and we thus AFFIRM Marshall's sentence.

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. 1:93-CR-21

UNITED STATES OF AMERICA,
Plaintiff,

vs.

EDWARD B. CROUSE,
Defendant.

Sentencing

Before

THE HONORABLE ROBERT HOLMES BELL
United States District Judge
November 22, 1993

* * * *

[44] This Court will grant a downward departure in this case, objections of the Defendant being reserved. Downward departures are to be very sparingly used by the Court as a [45] sentencing methodology. The reason for that remains obvious, and that is sentencing uniformity and the module of punishment which this whole scheme is predicated upon require that regardless of who the judge is, regardless of where the district is, regardless of who the defendant is or where he comes from, the sentence should be a predictable one. To engage in departures outside the guidelines, whether they be upward or downward, is to be rarely undertaken.

However, having said that, I find these circumstances are peculiarly and substantially unusual in their entirety,

and I suppose I had better talk to the Court of Appeals at this point from here on. The question of sentence must be to get at a proportional analysis among many defendants in a case such as this and determine which is more culpable than the other, which should be punished more strictly than the other in light of the contribution each has made to the illegality; then after that analysis is roughly undertaken, to look at the particular individual to see whether or not the particular individual's other life—that is, the life outside the criminal activity that is directly before this Court—is so unusual as to take it into an extraordinary category as to be extraordinarily out of the heartland of those who normally would appear before a court.

Now, this is for the Court of Appeals' benefit. About once a year this Court departs downward, maybe twice, [46] but once a year this Court departs downward. This Court has departed downward probably not more than ten times in this Court's sentencing under the Sentence Reform Act of 1984. I want the Court to know that because of its unusual nature.

What I find is in particular circumstances under 18 U.S.C. 3553(a) where the cumulative and collateral punishments in fact are most egregious on an individual outside the sentencing framework of the Court, this Court has to take that into consideration. In this particular situation this individual, Mr. Crouse, was by all accounts an outstanding member of the Lansing, Michigan, community. I say this having known the Lansing community quite intimately, not having known Mr. Crouse other than who he was. I want that to be very clear. His position in the Lansing community was probably among a small handfull of individuals who it can be said, outside the governor and the political structure which is ever present in Lansing, this individual would stand among really a handful of individuals in a leadership position. I want the Court of Appeals to know that as a finding.

As a result of the publicity, obviously, it's clear the mortification and public approbation that in fact has followed, and it is continuing, I would note, based upon some recent television coverage and extensive newspaper coverage in this matter. There was a product recall that was undertaken apparently by Mr. Crouse, cooperation with FDA, removal of Mr. [47] Wagoner from his role as a president, all matters that occurred here prior to the indictment being issued, the result of which basically made Peninsular Products worthless and required the closure and the loss of the ownership in this matter. This has jeopardized the pension rights of Mr. Crouse and has placed several people out of employment.

That's a minor component as to what I see is the close family ties and the community ties which I find are extraordinary under 5H1-5H.1.6. Under 5H.11 under other calculations I find that his charitable and prior good works are extremely unusual. Let me just list a few of these that I've concluded based upon the large number of documents I have received.

He was one of the charter persons who established the Lansing Airport Authority; board chairman, bank director, chairman of the board of the bank of First of America-Central of Lansing; on the board of Sparrow Hospital, one of the primary originators, Sparrow Hospital being the largest medical care facility in central Michigan. He was one of the initiators, planners, and board members of Physician's Health Plan, one of the premier physician health plans in the United States. I find that he was board chairman and leader of Plymouth Congregational Church, a rather prominent church in the area. Greater Lansing United Way, he's been on the board of that. Lansing Rotary, he's been on the board of that. He [48] was a primary contributor to the Lansing Food Bank. He was chairman of the Greater Lansing Chamber of Commerce and served a number of years in various capacities of that nature as well as serv-

ing on the board of the American Red Cross. I could go on and on with what I have found here in the documents that come before me of a very unusual nature. No other defendant in this case compares even within a mile of this kind of participation.

Now, one might argue, well, his position of hands-off leadership enabled him to do this. Well, that's the way it occurred this time.

I further find that the nature of these charitable and prior good works had, other than the bank of First of America-Central, no remuneration whatever to him. That is, these were matters that were undertaken purely of a voluntary nature and they have continued rather unabated for 30 years or more. So we don't have a short term, we have a long term.

Letter after letter that has come to me has disclosed from various individuals, some of whom I know and many of whom I don't know, but I know of them, have indicated to me great confidence in this individual over a long period of time. Now, let me say I get hundreds of letters in the course of a year or in the course of several years. Many of them are designed to manipulate me. I know that. I wasn't born yesterday. Many are designed to give me background of an [49] individual for one or two years, maybe five years of knowing an individual. They're not over a long span as Mr. Crouse's. And I like to think that one's life in the long run accounts for something.

Now, granted, in this particular case for an individual 60 years of age it ought to count for something. Now, an individual 32 who appears in front of me who has three or four years of background that people can say good things about doesn't stand in the stead of a 60-year-old. If the 60-year-old were a person who had a disposition of criminality, their CPA wouldn't wirte me a letter, the person who filled in their taxes wouldn't write letters on their behalf. People who knew them would remain silent.

In this particular case it's extremely important that the people that know Mr. Crouse the best have come forth to tell, virtually all of them, about the contribution he has had in this matter. This is probably an individual who has made a greater singular contribution to a middle-sized community than anyone else who's ever appeared before this Court.

Now, let me go back to the other issues, the issue that continually concerns me. That is the culpability of Mr. Crouse as it stands in opposition to Mr. Wagoner and Mr. Marshall. He is clearly on a entirely different rung of culpability for what occurred. Totally different rung. Mr. Benton, clearly on a different rung than Mr. Benton. Mr. [50] Benton was out hawking the product to everybody that would listen. He was encouraging five salesmen to continue to sell that product knowing that he was financially benefiting from a product he knew to be not in conformity with the FDA requirements.

Now, Mr. Crouse's role was a silent one. And I concur with the government, one shouldn't be able to sit back in silence and be able to say hey, my hands are clean, I didn't touch the stuff. One should not be able to walk away from criminal culpability. No, I agree. However, having said that, I don't think one should be punished on the same level and with the same intensity as one who directly participates. There has to be a difference.

Lastly, I find this. Justice has to be achieved in a proportionality analysis between the parties, and if I were to take an offense level of 19 and a criminal history level of I into the sentencing range that has been proposed here, that range would be almost at the top of the statutory maximum of Count 15 that is before me. Now, that absolutely makes no sense whatever. If in fact the sentence calculation is to be based upon a guideline and it's to be just, then some consideration should have to be given for an unusual person such as Mr. Crouse who for

the first time finds himself before a court. If that isn't the case, then I'm unnecessary. We just plug in some facts into a computer, get the result, [51] everybody goes on and acts in accordance with the computerized result. I don't think that's what Congress intended, and I don't think that's what the Court of Appeals when they review this will conclude, either, and that is some latitude has to be given to the Court to make findings such as this, together with findings of a maximum fine in this case that can be balanced in a departure downward situation.

So I'm granting that downward departure * * *.

* * * *

[56] The sentence of this Court cannot be one-dimensional and look at the scare or the deterrence that it might instill in other people. Certainly we have only to look at other countries to see, particularly totalitarian regimes, to see how well deterrence can work. Deterrence is but one of the componentries which goes into a sentence. Certainly punishment is another, certainly rehabilitation is another.

When looking at punishment in a matter like this, one can look at punishment on several different levels to be fair [57] to all individuals involved. Punishment to some people may be merely their name on the front page, merely the public approbation, anger that goes with what they've done. It can be the loss of reputation. That can be a punishment that's all by itself. It can be a punishment that the person committing a violent crime who has nothing to lose, who has no status in the community and who might find status in fact being convicted of a crime, would never know. So consequently, this Court must look at a sentencing function in the many facets and dimensions that this case presents and look at all these issues of rehabilitation, deterrence, punishment, and protection of society as part and parcel of its function.

This Court having granted a downward departure from an offense level of 19 and a criminal history level of I would fashion the following as a sentence, and in fashioning this as a sentence, I may use the terms—I may have to, when I put an order together, put different terminology on this. But the following is going to be the sentence of this Court.

Commencing on December 1 of 1993, Mr. Crouse will serve 12 months of home confinement. He will be confined to the residence that he selects, and he will not be released from that residence for one year unless for medical purposes or with the consent of the probation agent who is to be in charge of him. He will pay all costs that are entailed in [58] either electronic monitoring or in probation supervision of himself during that 12 months while he is in home confinement.

This 12 months of home confiement this Court will calculate to be synonymous to, for purposes of punishment, 12 months spent in an institutional setting. This is not to be mistaken for a term of probation. This is not to be mistaken for a term of supervised release. This is an institutional confinement, but the institution is a home confinement for purposes of this Court's determination. Now, I say that because I'm not exactly sure what I'm going to call this, but I know this is what's going to work out. All costs in conjunction with that.

This Court assesses the maximum fine in this matter under Count 15 of $250,000 to be paid in the course of the confiement-supervised release term here that's involved in this case and requires that a mandatory special assessment of $50 be taxed in addition thereto. This being one count, there need be no consecutive or concurrent sentencing in this case.

Any questions about the sentence this Court has imposed, Mr. Dodge?

MR. DODGE: No, sir.

THE COURT: Any questions about the sentence the Court has imposed, Mr. Bratt?

MR. BRATT: What is the final offense level, Your Honor?

[59] THE COURT: I'm not going to determine one. If you want me to, I will determine one, but I think I've departed downward significantly, and unless you require me to—

MR. BRATT: I think for purposes of the Court of Appeals, if this goes there, one of the issues it has to decide is the reasonableness of departure. So I think we do probably have to know how many levels you've departed.

THE COURT: Well, I'm not sure I have to do that. In order to get to a home confinement level I'd have to drop to a level 13 where I would have a range under the '87 table of 12 to 18, and I'm giving 12, being a home confinement sentence in this matter, all right. So I'm dropping from 19 to 12 if the parties require me to for purposes of that calculation.

* * * *

APPENDIX F

[Filed Apr. 30, 1996]

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 95-1189

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

EDWARD BOYLES CROUSE,
Defendant-Appellant.

ORDER

Before: BOGGS and DAUGHTREY, Circuit Judges; and MATIA,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the pettion is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

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* Hon. Paul R. Matia, United States District Judge for the Northern District of Ohio, sitting by designation.

APPENDIX G

STATUTES AND SENTENCING GUIDELINES INVOLVED

18 U.S.C. 3553(b) provides in relevant part:

> (b) Application of guidelines in imposing a sentence.—The court shall impose a sentence of the kind and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. . . .

21 U.S.C. 331(a) provides in relevant part:

> The following acts and the causing thereof are hereby prohibited:
>
> (a) The introduction or delivery for introduction into interstate commerce any food . . . that is adulterated or misbranded.

21 U.S.C. 333(b) provides in relevant part:

> (b) . . . intent to defraud or mislead. Notwithstanding the provisions of subsection (a) of this section, if any person . . . commits such a violation with the intent to defraud or mislead, such person shall be imprisoned for not more than three years. . . .

U.S.S.G. 2F.1 provides in relevant part:

> (b) Specific Offense Characteristics
>
> (1) If the estimated, probable or intended loss exceeded $2,000, increase the offense level as follows:

	Loss	Increase in Level
(L)	Over $5,000,000	Add 11

U.S.S.G. 2N2.1. *Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product*

(a) Base Offense Level: 6

U.S.S.G. 5H1.6, p.s. provides in relevant part:

> Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

U.S.S.G. 5K2.0, p.s. provides in relevant part:

> Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that result in a sentence different from that described." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed or analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the courts. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration by the guidelines (*e.g.*, as a specific offense characteristic or other adjustment),

if the court determines that, in light of the unusual circumstances, the guideline level attached to that factor is inadequate.

Where, for example, the applicable guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental function, § 5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guideline, is applicable, however, and the theft caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several people were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances where that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

An offender characteristic or other circumstance that is not ordinarily relevant in determining whether a

sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing.

Supreme Court, U.S.
FILED
AUG 14 1996
OFFICE OF THE CLERK

(2)

No. 95-2010

In the Supreme Court of the United States

OCTOBER TERM, 1995

EDWARD B. CROUSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals' decision should be vacated and remanded for further consideration in light of *Koon* v. *United States*, 116 S. Ct. 2035 (1996).

2. Whether a white collar defendant should be compared with others who commit the same kind of offense, rather than all criminal defendants, in deciding whether his civic contributions are atypical and therefore a permissible ground for a departure under the Guidelines.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-2010

EDWARD B. CROUSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 78 F.3d 1097. The opinion of the court of appeals in the prior appeal (Pet. App. 17a-37a) is reported at 38 F.3d 832.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1996. A petition for rehearing was denied on April 30, 1996. The petition for a writ of certiorari was filed on June 13, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Western District of Michigan to one count of shipping adulterated orange juice in interstate commerce, in violation of 21 U.S.C. 331(a) and 333(b) (1982) (recodified after the date of petitioner's offense as 21 U.S.C. 333(a)(2)). Pet. App. 21a. Petitioner was sentenced to probation, with a 12-month term of home confinement as a condition of probation. Petitioner was also assessed a $250,000 fine. The court of appeals vacated the sentence and remanded for resentencing. On remand, the district court sentenced petitioner to 18 months' imprisonment. *Id.* at 3a, 26a, 17a-37a. The court of appeals affirmed. *Id.* at 1a-11a.

1. Petitioner was the owner, former chief executive officer, and chairman of the board of Peninsular Products Co. (Peninsular), a manufacturer and distributor of orange juice. Pet. App. 19a. Peninsular manufactured what it claimed was pure orange juice from concentrate. *Id.* at 19a-20a. Under the Food, Drug, and Cosmetic Act, it is unlawful to add sugar, preservatives, or other similar additives to a beverage sold as orange juice from concentrate. *Id.* at 18a-19a. Beginning in 1979, however, Peninsular manufactured its purportedly pure orange juice from concentrate that consisted primarily of sugar and other additives designed to conceal the presence of sugar. *Id.* at 21a. Peninsular obtained the concentrate from Flavor Fresh Foods Inc. (Flavor Fresh). *Id.* at 19a. Flavor Fresh and its owners were knowing participants in the scheme. *Id.* at 19a-21a.

Peninsular also sought to extend the shelf life of its orange juice without having to invest in the new

equipment and better maintenance practices necessary to achieve such a result lawfully. Pet. App. 20a. To accomplish that goal, Peninsular purchased from Fred Kohlbach a potent and undetectable preservative. *Ibid.* Peninsular also purchased from Kohlbach machinery that enabled the surreptitious injection of the preservative into the juice. *Ibid.* By using Kohlbach's preservative, Peninsular was able to increase the shelf life of its juice and avoid the losses that its competitors experienced. *Ibid.* Peninsular's use of adulterants continued until 1991, when a Food and Drug Administration (FDA) inspector uncovered Peninsular's unlawful practices. *Id.* at 21a.

Although petitioner owned Peninsular, he was not active in the day-to-day management of the firm, having delegated that responsibility to the company's president, Wayne Wagoner. Pet. App. 19a. Nonetheless, petitioner was a full participant in the scheme to defraud. *Id.* at 19a-20a. He made the decision that Peninsular would use Flavor Fresh's sugared concentrate in manufacturing its purportedly pure juice. C.A. App. 107-108. Petitioner also authorized the use of Kohlbach's preservative and the purchase of Kohlbach's injection system. *Ibid.* When there was a threat that a competitor might inform the FDA of Peninsular's adulteration practices, petitioner attempted to insulate himself from liability by resigning as chief executive officer and naming Wagoner as his replacement. *Id.* at 106-107. Petitioner derived more than $1 million in income from Peninsular during the course of the conspiracy. Pet. App. 31a.

2. Petitioner was charged in a 33-count indictment relating to his role in Peninsular's scheme. Pet. App. 18a. Pursuant to a plea agreement, petitioner pleaded

guilty to a single count of shipping adulterated orange juice in interstate commerce, in violation of 21 U.S.C. 331(a) and 333(b) (1982) (recodified after the date of petitioner's offense as 21 U.S.C. 333(a)(2)). Pet. App. 21a. The effect of that agreement was to limit the maximum term of imprisonment petitioner faced to three years. See 21 U.S.C. 333(a)(2).

Before petitioner's sentencing, the district court received numerous letters attesting to petitioner's good character and his many civic and charitable contributions. Pet. App. 25a-26a. Petitioner also supplied the district court with information concerning the business losses that he suffered once Peninsular's crimes were made public. *Id.* at 26a.

In sentencing petitioner, the district court determined that his offense level under the Sentencing Guidelines was 19, which resulted in a Guidelines range of 30 to 37 months' imprisonment. Pet. App. 26a-28a. The district court stated that it was departing downward by six levels, and it sentenced petitioner to probation, with a one-year term of home confinement as a condition of probation. *Id.* at 2a, 28a. At the time of petitioner's sentencing, a person, such as petitioner, who was in Criminal History Category I was not eligible for a sentence of probation for an offense level greater than six. Guidelines § 5C1.1 (1987). The district court therefore effectively departed downward by 13 levels. Pet. App. 2a. The district court gave three justifications for the departure: (1) petitioner's extensive civic and charitable contributions; (2) petitioner's business losses; and (3) petitioner's relative culpability compared to others involved in the scheme. *Id.* at 2a, 26a. As part of the plea agreement, petitioner also paid a $250,000 fine. *Id.* at 26a.

3. The court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. 17a-37a. Applying a de novo standard of review, the court of appeals rejected each of the grounds relied upon by the district court as a justification for sentencing petitioner outside his Guidelines range. *Id.* at 25a-31a. The court concluded that petitioner's community service activities did not place him outside the heartland of similar offenders. *Id.* at 29a-31a. The court explained that "it is *usual* and *ordinary*, in the prosecution of similar white-collar crimes involving high-ranking corporate executives such as [petitioner], to find that a defendant was involved as a leader in community charities, civic organizations, and church efforts." *Id.* at 29a. The court rejected the district court's reliance on business losses as a ground for departure, noting that the evidence did not show that petitioner suffered significant losses and that, in any event, "it is not unusual that a business built in significant part on fraud will suffer once the fraud stops." *Id.* at 26a n.5. Finally, the court concluded that the district court had already adequately taken into account petitioner's relative culpability by giving petitioner a two-level enhancement for his role in the offense under Guidelines § 3B1.1(c). Pet. App. 27a n.6.

4. Before his resentencing, petitioner presented additional evidence on his civic and charitable achievements. Pet. App. 3a-4a. At his resentencing hearing, petitioner also called four witnesses to testify about his contributions to the community. *Id.* at 4a. Relying on the court of appeals' mandate and the law of the case doctrine, the district court concluded that petitioner's additional evidence did not justify a downward departure. *Ibid.* With the govern-

ment's acquiescence, the district court departed downward by four levels to reflect the 12 months that petitioner already had spent in home confinement, *id.* at 12a-15a, and sentenced petitioner to 18 months' imprisonment, *id.* at 15a.

5. The court of appeals affirmed. Pet. App. 1a-11a. The court of appeals held that neither its mandate nor the law of the case doctrine precluded the district court from considering petitioner's request to depart downward based on his community service. *Id.* at 5a-6a. The court concluded, however, that the district court's refusal to consider petitioner's request was not reversible error, because, "[e]ven after the district court let [petitioner] put on additional testimony concerning his community service, it was and is still evident that he did not qualify for the reduction." *Id.* at 7a. The court explained that, although petitioner's new testimony "tends to reflect that his community service was above average even for a corporate executive," the court could say "with confidence" that petitioner's community service was not "highly unusual for a person in his position." *Id.* at 8a.

Petitioner filed a petition for rehearing, arguing for the first time that the court of appeals erred in exercising de novo review over the district court's departure decision. Pet. 10 & n.12. The court of appeals denied rehearing.

ARGUMENT

1. Petitioner contends (Pet. 11-15) that, because the court of appeals exercised de novo review over the district court's decision to depart downward from the applicable Guidelines range, the Court should grant certiorari, vacate the judgment below, and remand for further consideration in light of *Koon* v. *United*

States, 116 S. Ct. 2035 (1996). Although the court of appeals exercised de novo review over the district court's decision to depart, Pet. App. 29a, and *Koon* holds that departure decisions must be reviewed under an abuse of discretion standard instead, 116 S.Ct. at 2046-2048, this case need not be vacated and remanded for further consideration in light of *Koon*. The district court in this case abused its discretion in awarding a downward departure based on petitioner's civic contributions, business losses, and relative culpability. Thus, even though the court of appeals considered the district court's departure decision under the wrong standard of review, it correctly reversed that decision.

a. The Guidelines discourage departures based on civic or charitable contributions. Guidelines §§ 5H1.16, 5H1.11. Under *Koon*, a court may depart based on such discouraged factors only if they are "present to an exceptional degree or in some other way make[] the case different from the ordinary case where the factor is present." 116 S. Ct. at 2045. Petitioner's showing that he engaged in significant charitable and civic contributions was insufficient to satisfy that standard. As the court of appeals concluded, "it is not unusual for white collar executives to have a record of substantial community contributions." Pet. App. 7a-8a.

As the court of appeals suggested (Pet. App. 7a-8a), the district court would have had discretion to depart based on petitioner's civic and charitable contributions if petitioner had shown that his activities were exceptional for a corporate executive. Petitioner failed to make that showing. As the court of appeals explained, although petitioner's civic and charitable contributions were "above average" for a

corporate executive, it could say "with confidence" that they were not "highly unusual for a person in his position." Pet. App. 8a. The district court therefore abused its discretion in relying on petitioner's civic and charitable contributions as a basis for a downward departure.

The court of appeals' conclusion that petitioner's civic contributions may not serve as a basis for departure is similar to the Court's holding in *Koon* that job loss is not a permissible ground for a departure in cases involving public officials who use governmental authority to violate personal rights. 116 S. Ct. at 2052. Just as job loss is not an unusual factor in a case involving governmental officials who violate the rights of others, *ibid.*, significant civic and charitable contributions are not unusual factors in a case involving white collar offenders like petitioner.

b. The district court also abused its discretion in relying on petitioner's business losses as a departure ground. The evidence shows that the value of Peninsular was unaffected by public disclosure of its unlawful conduct. Pet. App. 26a n.5. In any event, as the court of appeals noted, "[i]t is not unusual that a business built in significant part on fraud will suffer once the fraud stops." *Ibid.* Thus, even if petitioner had demonstrated significant business losses, the district court could not have departed on that ground. *Koon*, 116 S. Ct. at 2052.

c. The district court similarly abused its discretion in relying on petitioner's culpability relative to his co-defendants as a ground for departure. Guidelines § 3B1.1 already takes that factor into account by adjusting a defendant's offense level based on his role in the offense. See Guidelines § 3B1.1, comment. ("This adjustment is included primarily

because of concerns about relative responsibility.") Under *Koon*, it is an abuse of discretion for a district court to depart based on a factor that the Guidelines already take into account. 116 S. Ct. at 2052-2053. Further examination of that issue is not warranted.

2. Petitioner contends (Pet. 16-22) that, in evaluating whether petitioner's civic and charitable contributions were unusual, the court of appeals erred in comparing petitioner only to others who commit the same type of offense. In petitioner's view, his activities should have been compared to all offenders. The Guidelines, however, authorize a departure from the prescribed sentencing range only if a case falls outside the "heartland" of "typical cases embodying the conduct that each guideline describes." Sentencing Guidelines, Ch. 1, Pt. A(4)(b) (Policy Statement). If a defendant is typical of those covered by a particular Guideline, he falls within the "heartland" and is not eligible for a departure. Consistent with that directive, this Court in *Koon* compared the defendants' supposedly atypical characteristics in that case to the characteristics of others covered by the same offense Guideline, not to all offenders. 116 S. Ct. at 2049-2050, 2052 (comparing victim provocation and job loss of the defendants to others covered by civil rights guideline). Petitioner's contention that he should receive a departure for his charitable activities, even if those activities were within a range typical of persons who have committed the same kind of offense, is therefore inconsistent with the approach outlined by the Sentencing Commission and with this Court's decision in *Koon*.

Petitioner contends (Pet. 16) that the court's decision in this case conflicts with *United States* v. *DeMasi*, 40 F.3d 1306, 1323-1324 (1st Cir. 1994), cert.

denied, 115 S. Ct. 947 (1995). That asserted conflict does not warrant review.*

In *DeMasi*, the district court awarded a departure to a bank robber on the ground that his community service was atypical for a bank robber. The court of appeals reversed, holding that the district court had erred in restricting the scope of its comparison to bank robber cases. 40 F.3d at 1324. The court stated that "[a] court should survey those cases where the discouraged factor is present, without limiting its inquiry to cases involving the same offense, and only then ask whether the defendant's record stands out from the crowd." *Ibid.*

DeMasi, however, did not confront a situation similar to this one, in which the characteristic on which the defendant relied to support a departure is likely to be present in many, if not most of the cases covered by the offense guideline. If confronted with such a case, the First Circuit might well hold that a departure would not be appropriate unless the defendant's activities were exceptional when compared to other defendants who commit the same offense. Indeed, the First Circuit has applied that approach in somewhat similar circumstances. See *United States* v. *Rivera*, 994 F.2d 942, 955-956 (1st Cir. 1993) (embezzlement guideline takes into account "normal restitution needs and practicalities," although special circumstances may warrant a departure); *United States* v. *Citro*, 938 F.2d 1431, 1439-1440 (1st Cir. 1991) (comparing defendant's claim of addiction as basis for departure to other drug traffickers), cert. denied, 502

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* The Court denied review of the same issue in *United States* v. *Haverstat*, 22 F.3d 790 (8th Cir. 1994), cert. denied, 116 S. Ct. 671 (1995).

U.S. 1044 and 504 U.S. 931 (1992); *United States* v. *Aguilar-Pena*, 887 F.2d 347, 350 (1st Cir. 1989) (stating that the correct inquiry is whether there is "something 'special' about a given offender, or the accouterments of the crime committed, which distinguishes the case from the mine-run for that offense."). In addition, *DeMasi* was decided before this Court issued its decision in *Koon*, in which the Court compared the claims of the defendants to other defendants who commited the same kind of offense. The First Circuit may well reevaluate *DeMasi* in light of *Koon*.

In any event, the question whether a defendant should be compared to persons who have committed the same offense, all defendants, or both, is a question of Guidelines interpretation. Any inconsistency between the circuits on that issue is best resolved by the Sentencing Commission, rather than this Court. See *Braxton* v. *United States*, 500 U.S. 344, 348 (1991); see also *Koon*, 116 S. Ct. at 2051 (noting that Commission has assumed that its role is to revise the guidelines to specify departure factors and that Congress did not clearly direct the courts to supervise "the Commission's treatment of departure factors," and concluding that "we will not assume that role").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

EDWARD B. CROUSE,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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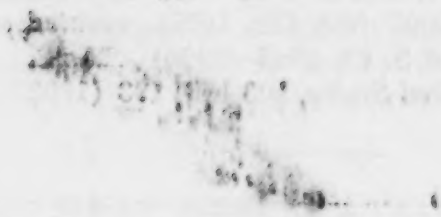

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IN THE

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OCTOBER TERM, 1996

No. 95-2010

EDWARD B. CROUSE,

Petitioner,

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UNITED STATES,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

In *Koon* v. *United States*, 116 S. Ct. 2035 (1996), this Court held that a district court's decision to depart from the Sentencing Guidelines based upon the presence of a discouraged factor in an unusual or exceptional degree is reviewable under the deferential abuse-of-discretion standard. *Id.* at 2047. As the government concedes, the Court of Appeals in this case "considered the district court's departure decision under the *wrong* standard of review" in light of *Koon*. Opp. 7 (emphasis added). That error caused the Court of Appeals to set aside the district court's finding that petitioner's exceptional record of charitable and community service warranted a departure. Consistent with this Court's established "GVR" practice, and its recent order in *United States* v. *Rybicki*, 116 S. Ct. 2543 (1996), the Court should grant the petition,

vacate the judgment below, and remand for further consideration in light of *Koon*.

ARGUMENT

1. As the Court reiterated this past Term, "the GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices." *Lawrence* v. *Chater*, 116 S. Ct. 604, 606 (1996) (per curiam). Perhaps the most common set of circumstances in which this Court has exercised its GVR authority is when (1) there is an intervening decision of this Court that the Court has "reason to believe the court below did not fully consider"; (2) there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration"; (3) "it appears that such a redetermination may determine the ultimate outcome of the litigation"; and (4) the "equities" favor reconsideration. *Id.* at 607. As explained next, each of these considerations cuts in favor of exercising the Court's GVR authority here.

2a. *First*, it is indisputable that the Sixth Circuit below did not have the benefit of this Court's decision in *Koon* when it reviewed petitioner's sentence in both of the prior appeals in this case, because *Koon* was not decided until June 13, 1996, the day on which the petition for certiorari was filed in this case.

b. *Second*, it is clear that the decision below rests upon a premise that the Sixth Circuit would reject if given the opportunity to do so. As explained in the petition, in reviewing petitioner's sentence, the Sixth Circuit, consistent with its own prior precedent, considered de novo the question whether the record supported the district court's decision to depart downwards on the basis of petitioner's exceptional record of charitable and community service. Pet. 8, 10.[1] As the government concedes, under

[1] As noted in the petition, petitioner objected below to the application of de novo review. Pet. 10 n.12.

this Court's intervening *Koon* decision, that was the "wrong standard of review." Opp. 7.

In *Koon* this Court recognized that "[a] district court's decision to depart from the Guidelines * * * will in most cases be due *substantial* deference, for it embodies the traditional exercise of discretion by a sentencing court." 116 S. Ct. at 2046 (emphasis added). This follows both from the nature of the departure determination and from the district court's superior vantage point to make it. As the *Koon* Court observed:

> Before a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do. [*Id.* at 2046-47.]

In this case and others, the Sixth Circuit had, prior to *Koon*, discounted the district court's special competence to make these determinations, and reviewed de novo the question whether a discouraged factor was present in such a degree as to take a case outside of the heartland and warrant a departure. *See* App. 29a. In the wake of *Koon*, however, the Sixth Circuit itself has recognized that district court departure determinations are reviewable only for abuse of discretion, and not de novo. *See United States* v. *Barajas-Nunez*, —— F.3d ——, 1996 WL 438661, at *3-*4 (6th Cir. Aug. 6, 1996). In other

words, following *Koon*, the Sixth Circuit has disavowed the premise upon which petitioner's sentence was reviewed.

c. *Third*, it is evident that, at a bare minimum, permitting the Sixth Circuit to reconsider its prior decisions in this case under *Koon*'s deferential abuse-of-discretion standard *might* determine the "ultimate outcome" of this litigation, which is all that is required to warrant a GVR order in the proper circumstances. *Chater*, 116 S. Ct. at 607. Indeed, contrary to the suggestion of the government, the district court's departure decision in this case is tailor-made for *Koon* deference.

At sentencing, the district judge reviewed a substantial amount of information and heard testimony regarding petitioner's 30-year record of charitable and civic contributions to the community in which he lived and with which the judge was "intimately" familiar. App. 39a. The district judge concluded that this record was "extraordinary" and "extremely unusual" in nature. App. 40a. Indeed, he found that petitioner "ha[d] made a greater singular contribution to a middle-sized community than anyone else * * * ever appear[ing] before th[e] Court." App. 42a. Thus, while recognizing that "[d]ownward departures are to be very sparingly used by the Court as a sentencing methodology," the judge ultimately determined that the unique circumstances of petitioner's case warranted such a departure. App. 38a. *See* Pet. 6-7.

In its brief in opposition, the government argues that, notwithstanding the district court's detailed findings regarding petitioner's community service record, the Sixth Circuit would reach the same conclusion under *Koon*'s abuse-of-discretion standard as it did in applying de novo review. Opp. 7. That argument fails for several reasons. First, the record refutes the government's suggestion (*id.*) that petitioner's charitable and community service record is not exceptional when compared to that of other corporate executives. As noted in the petition, the record establishes that "[petitioner]'s volunteer efforts began at

a relatively young age"—before he became a corporate executive. App. 4a. Moreover, on remand from the first appeal, petitioner put on additional evidence establishing that his record was extraordinary when compared to similarly situated white-collar defendants in particular. *See* Pet. 20 n.17.

Second, the government erroneously suggests that the district court improperly based its departure decision on petitioner's businesses losses and his culpability in relation to his co-defendants. Opp. 8-9. It is quite clear that the district court grounded its decision to depart in its findings regarding petitioner's extraordinary charitable and community service record. App. 40a-43a. As explained in the petition, and as the government does not dispute, that is a valid basis for a departure on a proper record. Pet. 8 n.7. Thus, even if the district court had improperly placed any reliance on the factors cited by the government, a remand would still be warranted. *See Williams* v. *United States*, 503 U.S. 193, 203 (1992) (when an appellate court determines that a departure is based in part on improper grounds, it must remand unless it concludes that the sentencing court would have imposed the same sentence using only proper grounds).

In any event, this Court rejected a similar argument in *Koon*. There, the government argued that certain departure factors such as a defendant's loss of career should always be deemed impermissible departure factors. 116 S. Ct. at 2050-51. The Court reasoned, however, that this was a policy argument better directed to the Sentencing Commission. Furthermore, the Court held that the Guidelines do not limit the number of factors that might support a departure, and that unusual circumstances might justify a departure if they exist in an extraordinary degree in any particular case. *Id.* at 2050. Of course, under *Koon*, the district court's determination that the circumstances are so unusual or extraordinary as to warrant a departure is entitled to deference.

Moreover, the government's argument that this Court should deny the petition on the ground that the Sixth Circuit would reach the same result applying *Koon* flies in the face of the decision of the Court of Appeals to stay the mandate to permit petitioner to file this petition. Petitioner's stay request was based in principal part on his argument that this Court's then-impending decision in *Koon* would have a direct bearing on this case. The Sixth Circuit granted this request over the government's opposition. The Court of Appeals' decision to grant the stay simply cannot be squared with the government's position here that the Sixth Circuit would necessarily reach the same result under *Koon*. *See* 6th Cir. R. 15(a) (standards governing stay petitions).

The government's request that this Court deny certiorari on the ground that the Sixth Circuit would reach the same result under *Koon* also is inappropriate in light of the considerations governing the exercise of this Court's GVR authority set forth in *Lawrence* v. *Chater, supra*. In effect, the government asks this Court to consider this case on the merits—in the absence of briefing and argument—and to conclude that the result would be no different under the vastly different standard of review mandated by *Koon*. As this Court observed last Term in *Chater*, that would be a wasteful allocation of this Court's "scarce resources." 116 S. Ct. at 606. Even in the close case (which this is not), a GVR order is warranted to "procur[e] the benefit of the lower court's insight" as to the import of an intervening event before this Court considers the development itself. *Id.*

d. *Fourth*, the equities cut decisively in favor of remanding this case to the Sixth Circuit so that it may reconsider its decision under the proper standard of review. No less than personal liberty interests are at stake—the additional 18 months' imprisonment to which petitioner would be condemned under the Sixth Circuit decision applying what everyone now recognizes was "the wrong standard of review." Opp. 7. In similar cir-

cumstances, this Court recognized in *Stutson* v. *United States*, 116 S. Ct. 600 (1996) (per curiam), that the considerations favoring the exercise of this Court's GVR authority are heightened in a criminal case in which "a litigant is subject to the continuing coercive power of the Government in the form of imprisonment." *Id.* at 603. In these circumstances, "a GVR order both promotes fairness and respects the dignity of the Court of Appeals by enabling it to consider potentially relevant decisions and arguments that were not previously before it." *Id.*

3. For the foregoing reasons, each of the considerations identified in *Chater* supports the exercise of this Court's GVR authority here. But that comes as little surprise. This Court already has exercised that authority in circumstances analogous to those presented here. *United States* v. *Rybicki*, 116 S. Ct. 2543 (1996).

The district court in *Rybicki* departed downwards at sentencing in part on the basis of discouraged factors including the defendant's extraordinary family responsibilities and military service. Applying a de novo standard of review, the Fourth Circuit reversed in part based on its view that the defendant's situation was not sufficiently extraordinary to warrant a departure. *See United States* v. *Rybicki*, 60 F.3d 826 (table), 1995 WL 420001, at *6-*7 (4th Cir. 1995). On June 24, 1996, less than 10 days after the *Koon* decision was handed down, this Court issued a GVR order in the *Rybicki* case, which was pending on certiorari, so that the Fourth Circuit could reconsider its decision in light of *Koon*. 116 S. Ct. at 2543.

The case for deference to the district court's departure decision is much stronger in this case than in *Rybicki*. But this Court's GVR order in *Rybicki* provides an additional reason for following the same course here. One of the considerations favoring the exercise of this Court's GVR authority is that the GVR order "alleviates the potential for unequal treatment that is inherent in [the Court's] inability to grant plenary review of all pending

cases raising similar issues." *Lawrence* v. *Chater*, 116 S. Ct. at 606-607 (internal quotation marks and citation omitted). In light of this Court's GVR order in *Rybicki* in circumstances analogous to those presented here, the potential for unequal treatment is especially acute in this case and weighs heavily in favor of the same result as in *Rybicki*.

4. Finally, this Court need not reach the second question presented by this petition in the event it determines that a GVR in light of *Koon* is appropriate. Nevertheless, the government is incorrect in suggesting that this question does not merit plenary review. Opp. 9-11. As explained in the petition, the circuits are split on the question whether, in determining if a defendant's conduct or prior record is sufficiently unusual to warrant a departure under the Sentencing Guidelines, the district court should compare the defendant's case only with cases involving defendants convicted of the same type of offense. *See* Pet. 16-20.[2] That question is important and squarely implicated by this case. *Id.* at 20-21.

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[2] The government suggests that *United States* v. *DeMasi*, 40 F.3d 1306 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 947 (1995), is distinguishable in that community service is supposedly atypical for bank robbers like the defendant in *DeMasi* but typical for those convicted of fraud like petitioner here. Opp. 10. The government offers no support for this stereotypical observation, and, in fact, the Sentencing Guidelines for fraud cover a broad range of crimes committed by all sorts of individuals, including those not prone to community service. Moreover, there is no basis in the First Circuit's opinion in *DeMasi* for adoptng the government's self-serving interpretation of that case. The First Circuit made its position unambiguous in *DeMasi* that, in determining whether to depart based upon a permissible factor, "[a] court should survey those cases where the departure factor is present, *without limiting its inquiry to cases involving the same offense*, and only then ask whether the defendant's record stands out from the crowd." 40 F.3d at 1324 (emphasis added). As explained in the petition, that position conflicts with the rule established by the Eighth Circuit in *United States* v. *Haverstat*, 22 F.3d 790, 795-796 (8th Cir. 1994), *cert. denied*, 116 S. Ct. 671 (1995), and applied by the Sixth Circuit below, *see* Pet.

Contrary to the suggestion of the government (Opp. 9), *Koon* did not resolve that question. Indeed, the question was not raised by either party in *Koon* and was never specifically addressed in the Court's decision. Moreover, the conflict identified in the petition will not, as the government also suggests, go away, since the question of the proper yardstick for determining whether to depart based on the existence of a discouraged factor in some unusual or extraordinary way is intrinsic to virtually every departure decision based upon such a factor, and therefore will continue to confront the courts. In the event this Court declines to issue the requested GVR order, therefore, it should take the opportunity to resolve this conflict here.[3]

17, which substantially narrows the survey to cases involving defendants convicted of the *same type of offense*.

[3] The government suggests that the Sentencing Commission, not this Court, is the proper entity to resolve this fundamental issue of departure analysis. Opp. 11. Neither of the cases it cites, however, supports this argument. In fact, in *Braxton* v. *United States*, 500 U.S. 344 (1991), the Court stated: "A principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law." *Id.* at 347. Moreover, the government's position is belied by this Court's decision in *Koon*, as well as numerous cases before it, in which this Court resolved circuit conflicts, such as the one presented here, concerning the proper application of the Sentencing Guidelines.

CONCLUSION

For the foregoing reasons, and for those set forth in the petition, this Court should grant the petition, vacate the judgment below, and remand for further consideration in light of *Koon*. Alternatively, the Court should grant the petition and decide the other important question presented.

Respectfully submitted,

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